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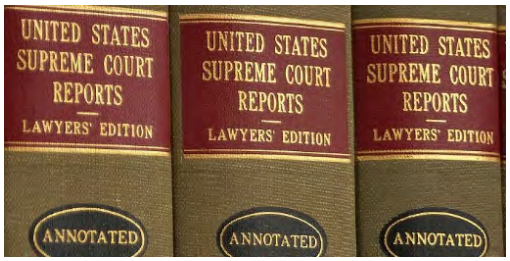

HOW TO WIN A PARTITION ACTION

FACULTY

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November 4, 2021
Suffolk County Bar Association, New York

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PARTITION ACTIONS

THURSDAY, NOVEMBER 4, 2021

5:30 P.M. – 8:15 P.M.

AGENDA

5:30 – 5:35 p.m. **Welcome and Introduction** - Hon. David T. Reilly

5:35 – 6:05 pm **Mechanics of Bringing an Action** – Peter Mott, Lisa Perillo, Jarrett Behar – (30 minutes)

- Statutes/Basic case law
- Rights and obligations of tenants in common
- Practical Considerations
    - Settlement Considerations

6:05 – 6:35 pm **The Reference** – Paula Warmuth, Richard Kaufman, Peter Tamsen, Matt Mady – (30 minutes)

- Referee – How and When to Appoint a Referee
    - Analyzing Debits and Credits; How are they Handled
- Receiver – When to Appoint a Receiver/Exception

6:35 – 7:05 pm **Attorney for the Referee/Receiver**– Matt Mady, Mark Goldsmith – (30 minutes)

- Constructive Trusts
- Bankruptcy
- Pitfalls and Problems

7:05 – 7:15 pm **Break**

7:15 – 7:45 pm **New Law - Uniform Partition of Heirs** – Glenn Warmuth – (30 minutes)

- Co-tenants
- Siblings

7:45 – 8:05 pm **Insuring Partition Actions** – Paul Bugoni – (20 minutes)

- Obligations

8:05 – 8:15 pm **Q & A** – (10 minutes)

Hon. David T. Reilly, Supreme Court, Suffolk County

Hon. David T. Reilly attended James Madison University where he received his Bachelors of Arts Degree in 1983, double majoring in political science and Russian studies.

He worked for the New York State Assembly, the Supervisor of Town of Huntington and for the New York State Senate. While working, he attended St. John's University School of Law, graduated in 1992, and was admitted to the New York State Bar in 1993. He began his career in law as an associate at Meiselman, Boland, Reilly & Fugazzi. Thereafter, he and his father, John J. Reilly, opened their own firm in 1999. Reilly & Reilly, LLP, was a general practice law firm which focused on state and federal civil litigation, including personal injury, commercial, contract, tort, contested estate and election law, at both the trial and appellate level.

In 2013, David Reilly was elected to the judicial position of Justice of the Supreme Court of the State of New York, 10th Judicial District. He previously served in a dedicated matrimonial part in Central Islip, New York and he presently serves in the civil part in Riverhead, New York.

David Reilly is a member of the Suffolk County Bar Association & Huntington Lawyers Club.

LISA PERILLO, ESQ.

Ms. Perillo is an experienced litigator, regularly litigating claims successfully both in federal and state courts. She is admitted to practice in the New York State and Federal Courts for Southern and Eastern District of New York and has represented individuals, businesses, and municipalities across a broad range of business, torts and other civil disputes, from initial counseling through to victory at trial and on appeal.

Although broadly experienced in civil litigation for over a decade, Ms. Perillo concentrates her practice in commercial law, real property/land-use litigation, civil rights/constitutional law, municipal law and construction law. Ms. Perillo recently expanded her practice to include Mental Hygiene Law Article 81 proceedings and guardianship matters and has been appointed by the Supreme Court to serve in various capacities in connection with Article 81 guardianship proceedings.

Ms. Perillo graduated magna cum laude from Hofstra University School of Law where she was an Associate Editor of the Hofstra Law Review. Her Note, *Scraping Beneath The Surface: Finally Holding Lead-Based Paint Manufacturers Liable By Applying Public Nuisance and Market-Share Liability Theories*, was published in the Hofstra Law Review, and has been cited by a number of treatises, law reviews and journals. She has authored and co-authored various articles published in the New York Law Journal and the Suffolk Lawyer and is a repeat lecturer on municipal law topics including Land Use and Article 78 Proceedings at the Suffolk County Academy of Law. Ms. Perillo is a member of the New York State and Suffolk County Bar Associations. She currently serves as Chair to the Suffolk County Bar Association Federal Courts Committee and is a member of the Suffolk County Bar's Court Conferencing and Litigation Task Force.

Partition Actions

I. The Basics -- What is partition?

In general: A division of property between co-owners resulting in each owner acquiring an equal, individual ownership interests.

a. What type of property is subject to partition?

b. What types of ownership interest may be partitioned?

II. Voluntary Partition vrs. Judicial (Compulsory) Partition

a. Partition as a matter of right

b. Agreements affecting the right to partition

III. Partition as statutory and equitable in nature— and discretion afforded the Court

a. Physical Partition vrs. Partition by Sale and the great prejudice standard

IV. Summary of the history of partition and the evolving use of partition actions today

57 A.D.3d 925
Supreme Court, Appellate Division,
Second Department, New York.

Jeffrey H. ARATA, appellant,
v.
Deborah Schneider BEHLING, respondent.

Dec. 30, 2008.

Synopsis
Background: Tenant in common brought action against other tenant to partition property. The Supreme Court, Suffolk County, Rebolini, J., denied tenant's motion for summary judgment. Tenant appealed.

[Holding:] The Supreme Court, Appellate Division, held that genuine issue of material fact existed as to whether equity favored partition.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] **Partition** Cotenancy or other common interest of parties

Partition Right to and grounds for partition in general

The right to partition is not absolute, and while a tenant in common has the right to maintain an action for partition, the remedy is always subject to the equities between the parties. McKinney's RPAPL § 901.

16 Cases that cite this headnote

[2] **Judgment** Particular Cases

Genuine issue of material fact existed as to whether equity favored partition of tenancy in common, precluding summary judgment.

3 Cases that cite this headnote

Attorneys and Law Firms

****450** Fallon & Fallon, LLP, Sayville, N.Y. (James V. Fallon of counsel), for appellant.

John J. Broderick, Syosset, N.Y., for respondent.

A. GAIL PRUDENTI, P.J., MARK C. DILLON, RANDALL T. ENG, and JOHN M. LEVENTHAL, JJ.

Opinion
***926** In an action for the partition and sale of real property, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated May 6, 2008, which denied his motion for summary judgment.

ORDERED that the order is affirmed, with costs.

On January 31, 2005, Francis L. Arata (hereinafter Francis), conveyed his right, title, and interest to certain property in Islip (hereinafter the subject property), to his son, the plaintiff, Jeffrey H. Arata (hereinafter the plaintiff), while reserving a life estate. Prior to that conveyance and since 1992, Francis and his long-time companion, the defendant, Deborah Schneider Behling (hereinafter the defendant), owned the subject property as joint tenants with the right of survivorship. On July 29, 2007, Francis executed a document entitled "Release of Life Estate," releasing to the plaintiff his previously-held life estate in the subject property. In September 2007, the plaintiff commenced this action for partition and sale of the subject property alleging, inter alia, that he and the defendant each owned a one-half interest in it as tenants in common. The Supreme Court denied the plaintiff's motion for summary judgment. We affirm.

[1] "A person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners" (RPAPL 901[1]). The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties (*see* ****451** *Graffeo v. Paciello,*

46 A.D.3d 613, 614, 848 N.Y.S.2d 264; *Ripp v. Ripp,* 38 A.D.2d 65, 68–69, 327 N.Y.S.2d 465).

[2] Here, the plaintiff established his entitlement to summary judgment by demonstrating his ownership and right to possession of the subject property pursuant to the duly-executed bargain and sale deed dated January 31, 2005, and the "Release of Life Estate" dated July 29, 2007 (*see* RPAPL 901[1]; *James v. James,* 52 A.D.3d 474, 859 N.Y.S.2d 479). In response, the defendant raised triable issues of fact as to whether the equities favor her position (*cf. James v. James,* 52 A.D.3d 474, 859 N.Y.S.2d 479; *Donlon v. Diamico,* 33 A.D.3d 841, 842, 823 N.Y.S.2d 483). Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment.

All Citations

57 A.D.3d 925, 870 N.Y.S.2d 450, 2008 N.Y. Slip Op. 10570

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190 A.D.3d 919
Supreme Court, Appellate Division,
Second Department, New York.

Ingrid BERNHARDT, etc., appellant,
v.
Edward SCHNEIDER, respondent.

2018–07109
|
(Index No. 12519/16)
|
Submitted—November 10, 2020
|
January 27, 2021

Synopsis

Background: Former wife brought action against former husband, seeking partition of real property, the parties' marital home. The Supreme Court, Queens County, Timothy J. Dufficy, J., 2018 WL 3306409, granted former husband's motion to dismiss for failure to state a cause of action. Former wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] former wife was not entitled to involuntary partition of real property against former husband, and

[2] application of divisible divorce doctrine to former wife's action did not leave former wife without remedy or create unequal treatment of spouses.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (7)

[1] **Pretrial Procedure** Construction of pleadings

On a motion to dismiss for failure to state a cause of action, the pleading is to be afforded a liberal construction. N.Y. CPLR §§ 3026, 3211(a)(7).

[2] **Pretrial Procedure** Availability of relief under any state of facts provable

Pretrial Procedure Matters considered in general

Initially, on a motion to dismiss for failure to state a cause of action, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail. N.Y. CPLR § 3211(a)(7).

[3] **Pretrial Procedure** Fact questions

Pretrial Procedure Evidence

When evidentiary material is considered on a motion to dismiss for failure to state a cause of action, the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. N.Y. CPLR § 3211(a)(7).

[4] **Divorce** Joint or community property

Partition Cotenancy or other common interest of parties

Former wife was not entitled to involuntary partition of real property against former husband, where deed established that former husband and former wife owned property as tenants by the entirety, and foreign ex parte divorce decree, obtained without personal jurisdiction over former husband, terminated the parties' status as husband and wife but had no effect on former husband's property rights.

[5] **Partition** Cotenancy or other common interest of parties

Involuntary partition is not available where the property in question is held as tenants by the entirety.

[6] **Divorce** Joint or community property

Pursuant to the "divisible divorce doctrine," an ex parte foreign divorce decree cannot divest the non-appearing spouse of his or her rights of real property in a New York tenancy by the entirety.

[7] **Divorce** Joint or community property

Application of divisible divorce doctrine to former wife's action seeking involuntary partition of real property against former husband did not leave former wife without remedy or create unequal treatment of spouses, despite fact that former wife could no longer commence action in New York for distribution of property due to passing of six-year limitations period, where, after entry of Virginia divorce decree, either spouse could have commenced New York action for distribution of parties' New York real estate. N.Y. Dom. Rel. Law § 236(B)(2), (5).

Attorneys and Law Firms

***581** Gary J. Dmoch & Associates, Flushing, NY, for appellant.

Elisabeth A. Vreeburg, Kew Gardens, NY, for respondent.

REINALDO E. RIVERA, J.P., SYLVIA O. HINDS–RADIX, COLLEEN D. DUFFY, VALERIE BRATHWAITE NELSON, JJ.

***582** DECISION & ORDER

In an action, inter alia, for the partition of real property, the plaintiff appeals from an order of the Supreme Court, Queens County (Timothy J. Dufficy, J.), entered March 27, 2018. The order, insofar as appealed from, granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action for partition.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The parties were married in Queens County in 1982 and thereafter purchased certain real property in Rego Park (hereinafter the subject property), taking title as tenants by the entirety. In 1995, the parties separated and the plaintiff moved to Virginia. According to the plaintiff, she commenced an action for divorce in New York in 2007, but the action was dismissed due to her failure to comply with certain deadlines. Subsequently, the plaintiff filed for divorce in Virginia, where she had continued to reside since her separation from the defendant. The plaintiff obtained an ex parte final decree of divorce from the Circuit Court of the City of Richmond, Virginia, which was entered August 30, 2010 (hereinafter the Virginia divorce decree). The Virginia divorce decree stated that the defendant had no nexus with the State of Virginia and the plaintiff was seeking a "bifurcated divorce," asking that all matters relating to equitable distribution be reserved for determination by the New York courts. The Virginia divorce decree granted the plaintiff an absolute divorce from the defendant and reserved equitable distribution for adjudication in the appropriate jurisdiction.

Despite the fact that the Virginia divorce decree expressly left equitable distribution unresolved, the plaintiff did not thereafter commence an action for equitable distribution in New York within the six-year statute of limitations (*see Marshall v. Bonica,* 86 A.D.3d 595, 596–597, 928 N.Y.S.2d 48; *Walter v. Starbird–Veltidi,* 78 A.D.3d 820, 822, 911 N.Y.S.2d 120). Instead, on October 28, 2016, she commenced this action seeking, among other things, partition of the subject property. The Virginia divorce decree and the deed for the subject property were attached to the complaint as exhibits. Thereafter, the defendant moved pursuant to CPLR 3211(a)(7) to dismiss the complaint, contending, inter alia, that the parties owned the subject property as tenants by the entirety, and, therefore, there could be no partition. The defendant recognized that a tenancy by the entirety could be converted to a tenancy in common by a divorce decree, but argued that since the divorce decree here was an ex parte foreign judgment, it had no effect on the ownership of the New York property, and their ownership remained as tenants by the entirety. By order entered March

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27, 2018, the Supreme Court, among other things, granted that branch of the defendant's motion which was to dismiss the cause of action for partition. The plaintiff appeals.

[1] **[2]** **[3]** On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). "Initially, the sole criterion is whether the ***583** pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [citations omitted]; *see* *Leon v. Martinez,* 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

[4] Here, although the complaint alleged that the parties owned the subject property as tenants in common, the deed, which was attached to the complaint, established that they had taken title as tenants by the entirety. Further, the Virginia divorce decree, which also was attached to the complaint, established that the divorce obtained was ex parte with respect to the defendant, over whom the Virginia court lacked personal jurisdiction (*see* *Vanderbilt v. Vanderbilt,* 1 N.Y.2d 342, 351, 153 N.Y.S.2d 1, 135 N.E.2d 553, *affd* 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456; *Burford v. Burford,* 24 A.D.2d 491, 261 N.Y.S.2d 489).

[5] **[6]** Involuntary partition is not available where the property in question is held as tenants by the entirety (*see* *V.R.W. Inc. v. Klein,* 68 N.Y.2d 560, 564, 510 N.Y.S.2d 848, 503 N.E.2d 496; *Anello v. Anello,* 22 A.D.2d 694, 253 N.Y.S.2d 759; *cf.* General Obligations Law § 3–309). The plaintiff contends that the tenancy by the entirety dissolved by operation of law when the Virginia divorce decree was entered, and that the ownership interest in the subject property transformed from a tenancy by the entirety to a tenancy in common (*see Stelz v. Shreck,* 128 N.Y. 263, 269, 28 N.E. 510; *Yax v. Yax,* 240 N.Y. 590, 148 N.E. 717; *V.R.W. Inc. v. Klein,* 68 N.Y.2d at 566, 510 N.Y.S.2d 848, 503 N.E.2d 496; *Plancher v. Plancher,* 35 A.D.2d 417, 420–421, 317 N.Y.S.2d 140, *affd* 29 N.Y.2d 880, 328 N.Y.S.2d 444, 278 N.E.2d 650). New York, however, follows the "divisible divorce" doctrine, pursuant to which the ex parte Virginia divorce decree, obtained without personal jurisdiction over the defendant, terminated the parties' status as husband and wife, but had no effect on the defendant's property rights (*see* *Vanderbilt v. Vanderbilt,* 1 N.Y.2d at 352, 153 N.Y.S.2d 1, 135 N.E.2d 553, *affd* 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456). In conformity with this doctrine, it is well established that an ex parte foreign divorce decree cannot divest the nonappearing spouse of his or her rights in a New York tenancy by the entirety (*see Marshall v. Bonica,* 86 Ad3d 595, 596, 928 N.Y.S.2d 48; *Russo Realty Corp. v. Orlando,* 288 A.D.2d 289, 290, 733 N.Y.S.2d 447; *Young v. Knight,* 236 A.D.2d 534, 534–535, 653 N.Y.S.2d 673; *Peterson v. Goldberg,* 180 A.D.2d 260, 262, 585 N.Y.S.2d 439; *Matter of Nicholson,* 180 A.D.2d 685, 686, 580 N.Y.S.2d 65; *Lansford v. Lansford,* 96 A.D.2d 832, 834, 465 N.Y.S.2d 583; *Ackerman v. Ackerman,* 45 A.D.2d 856, 856, 358 N.Y.S.2d 535; *Rodriguez v. Rodriguez,* 40 A.D.2d 531, 531, 333 N.Y.S.2d 952; *Burford v. Burford,* 24 A.D.2d 491, 261 N.Y.S.2d 489; *Anello v. Anello,* 22 A.D.2d 694, 253 N.Y.S.2d 759; *cf. Elson v. Elson,* 149 A.D.2d 141, 149, 545 N.Y.S.2d 311). Contrary to the plaintiff's contention, the full faith and credit clause of the federal constitution requires only that New York recognize that the Virginia divorce decree dissolved the parties' marital status (*see* ***584** *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418, 77 S.Ct. 1360, 1 L.Ed.2d 1456). Thus, the tenancy by the entirety in which the parties own their marital home has not been terminated.

[7] Contrary to the plaintiff's contention, this application of the divisible divorce doctrine does not leave her without a remedy, nor does it create unequal treatment of the spouses. After entry of the Virginia divorce decree, either spouse could have commenced an action in New York to provide for the distribution of the New York property (*see* Domestic Relations Law § 236[B][2], [5]; *Young v. Knight,* 236 A.D.2d at 535, 653 N.Y.S.2d 673; *Mattwell v. Mattwell,* 194 A.D.2d 715, 717, 600 N.Y.S.2d 98; *Peterson v. Goldberg,* 180 A.D.2d at 262, 585 N.Y.S.2d 439). The plaintiff's failure to bring such an action within the applicable statute of limitations period does not compel a different result with regard to the availability of partition of the marital property.

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Accordingly, we agree with the Supreme Court's determination granting that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action for partition.

RIVERA, J.P., HINDS–RADIX, DUFFY and BRATHWAITE NELSON, JJ., concur.

All Citations

190 A.D.3d 919, 140 N.Y.S.3d 580, 2021 N.Y. Slip Op. 00407

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137 A.D.2d 371
Supreme Court, Appellate Division,
First Department, New York.

Ching CHIANG and Birger Blomback, Plaintiffs–Appellants,
v.
Aili CHANG, Defendant–Respondent.

June 9, 1988.

Synopsis
In **action** for judicial **partition**, the Supreme Court, New York County, McCooe, J., dismissed complaint, and plaintiffs appealed. The Supreme Court, Appellate Division, Carro, J., held that shares to cooperative apartment may be subject of judicial **partition**.

Order reversed, summary judgment granted and matter remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (5)

[1] **Partition** Courts of Equity

Independent of any statute, court of equity has inherent power to issue decree of **partition** or require sale of jointly owned property.

3 Cases that cite this headnote

[2] **Partition** Property and Estates Therein Subject to **Partition**

Actions for **partition** are not limited to real property.

2 Cases that cite this headnote

[3] **Partition** Property and Estates Therein Subject to **Partition**

Partition or sale of real property pursuant to statute governing **actions** for **partition** of estates in real property is not restricted to co-owners who hold title in fee simple; accordingly, **action** for **partition** or sale of leasehold estate is specifically within purview of the statute. McKinney's RPAPL § 901, subd. 1.

5 Cases that cite this headnote

[4] **Partition** Property to Be Included in **Action**

Equity co-owners may seek **partition** of both realty and personalty in one **action**. McKinney's RPAPL § 901, subd. 1.

1 Cases that cite this headnote

[5] **Partition** Property and Estates Therein Subject to **Partition**

Shares to cooperative apartment may be subject of judicial **partition**. McKinney's RPAPL § 901 et seq.

5 Cases that cite this headnote

Attorneys and Law Firms

****294** ***372** Lanny E. Walter, of counsel (Mark S. Mishler with him, on the brief; Walter, Thayer & Long, Albany, attorneys) for plaintiffs-appellants.

No appearance on behalf of defendant-respondent.

Before MURPHY, P.J., and ROSS, CARRO, ASCH and MILONAS, JJ.

Opinion

CARRO, Justice.

This is an **action** for judicial **partition** of a co-operative apartment and raises the novel question of whether such a **partition** is one of real property or personal property and whether this **action** may be maintained pursuant to Article 9 of the Real Property **Actions** and Proceedings Law (RPAPL).

The subject apartment is the sixth-floor apartment of 519 Broadway, New York, New York, a co-operatively owned apartment building. Plaintiffs Blomback and Chiang, husband and wife, and defendant Chang own, as tenants in common, 16 shares of 519 Broadway Corporation, which shares are allocated to the sixth-floor apartment. The parties do not

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dispute, and the stock certificate confirms, that defendant Chang owns a one-half interest in the shares and the other half interest is owned by Chiang and Blomback as joint tenants. Ownership of the shares entitles the owners to a proprietary lease, granting them a leasehold interest in the subject apartment for the period of time from November 1, 1979 to December 31, 2025.

As a result of differences which have arisen between the plaintiffs and the defendant, plaintiffs commenced this **action** seeking **partition** of the apartment or, alternatively, sale of the "property", should **partition** be unfeasible, and a division of the proceeds between the parties according to their respective rights and interests. By notice of motion dated February 12, 1987, plaintiffs sought summary judgment declaring that they have equal right and title with defendant Chang to the subject property or referring the **action** to a referee to take proof and make findings, *inter alia,* on the parties' respective rights and interests to the property and on whether the ****295** property may feasibly and legally be **partitioned** or must be sold as an entire unit. Defendant Chang opposed the motion, contending primarily that a co-operative apartment may not ***373** be **partitioned** under RPAPL Article 9. The IAS court denied the motion for summary judgment and, upon searching the record, dismissed the complaint. The court concluded that only real property could be **partitioned**, and shares to a co-operative apartment, being personal property, could not be **partitioned**.

Partition is "the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interests therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed according to the respective interests." 24 N.Y.Jur.2d, *Cotenancy and **Partition***, § 116, p. 376. It is an **action** between tenants in common or joint tenants [1] and may be effected voluntarily by mutual consent of the parties or by judicial order upon the application of one or more co-owners.

[1] Specific statutes governing the judicial **partition** of estates in real property have existed in this country since the time of the colonial governments. Indeed, so ancient is the history of judicial **partitions**, and so favored are **partitions** that it is now beyond contention that, independent of any statute, a court of equity has the inherent power to issue a decree of **partition** or require the sale of jointly owned property. *Hewlett v. Wood,* 62 N.Y. 75, 76; *Croghan v. Livingston,* 17 N.Y. 218, 220; *Mead v. Mitchell,* 5 Abb Prac. 92, *aff'd* 17 N.Y. 210; *Baldwin v. Baldwin,* 74 Hun 415, 417–418.

It is also a generally held view that absent an express agreement to the contrary, a testamentary restriction against **partition**, or extreme prejudice to a co-owner, a **partition** is a matter of right of a co-owner who no longer desires to hold or use the property in common. *Chew v. Sheldon,* 214 N.Y. 344, 348–349, 108 N.E. 552; *but see Barol v. Barol,* 95 A.D.2d 942, 943, 464 N.Y.S.2d 561; *Ripp v. Ripp,* 38 A.D.2d 65, 68–69, 327 N.Y.S.2d 465, *aff'd.* 32 N.Y.2d 755, 344 N.Y.S.2d 950, 298 N.E.2d 114 (**partition** of real property following a divorce decree is subject to a consideration of the equities between the parties).

[2] Contrary to the mistaken belief of the IAS court, **actions** for **partition** are not limited to real property any more than ownership as joint tenants or tenants in common is limited to ***374** real property. **Actions** for **partition** of estates in real property may perhaps be more common, and in New York are specifically governed by Article 9 of the RPAPL, but the right to seek **partition** of personalty in an **action** in equity is uncontrovertedly established in New York. *Loker v. Edmans,* 204 App.Div. 223, 227–228, 197 N.Y.S. 857, (savings account); *Shehan v. Mahar,* 17 Hun 129, 13017 Hun 129, 130 (a horse); *Andrews v. Betts,* 8 Hun 322, 325*Andrews v. Betts,* 8 Hun 322, 325 (sea vessel); *Cart v. Cart,* 176 Misc. 457, 459, 28 N.Y.S.2d 58 (bank account); *Rush v. Rush,* 144 Misc. 489, 491–492, 258 N.Y.S. 913 (investments).

[3] **[4]** Neither is it the case that a **partition** or sale of real property pursuant to Article 9 of the RPAPL is restricted to co-owners who hold title in fee simple. An **action** for **partition** under Article 9 may be commenced by "a person holding and in possession of real property as joint tenant or tenant in common in which he has an estate of inheritance, or for life, *or for years*...." [emphasis added] RPAPL § 901(1). Accordingly, an **action** for **partition** or sale of a leasehold estate is specifically within the purview of this statute. *See e.g., George v. Bridbord,* 113 A.D.2d 869, 870–871, 493 N.Y.S.2d 794; *Deeb v. Goryeb,* 258 App.Div. 93, 94, 15 N.Y.S.2d 617. So flexible are the equitable principles which guide all **actions** for **partition**, even those governed by statute (****296** *Grody v. Silverman,* 222 App.Div. 526, 529–530, 226 N.Y.S. 468), that in the interests of equity co-owners may even seek **partition** of both realty and personalty in one **action**. *Eisner v. Curiel,* 20 Misc. 245, 246, 45 N.Y.S. 1010; *Haight v. Haight,* 7 Hun 867 Hun 86.

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What makes the **partition** of the joint ownership interests in a co-operative apartment unique is its susceptibility of treatment as a **partition** of both realty and personalty. As the Court of Appeals noted in *Matter of State Tax Commission v. Shor,* 43 N.Y.2d 151, 154, 400 N.Y.S.2d 805, 371 N.E.2d 523:

> The ownership interest of a tenant-shareholder in a co-operative apartment is *sui generis.* It reflects only an ownership of a proprietary lease, and therefore arguably an interest in a chattel real, conditional however upon his shareholder interest in the co-operative corporation, an interest always treated as personal property. The leasehold and the shareholding are inseparable. For some special purposes, the real property aspect may predominate (see *Grenader v. Spitz,* 537 F2d 612, 617–620, *cert den* 429 US 1009 [97 S.Ct. 541, 50 L.Ed.2d 619]; cf *United Housing Foundation v. Forman* 421 US 837, esp 854–860 [95 S.Ct. 2051, 2061–64, 44 L.Ed.2d 621], *reh den* 423 US 884 [96 S.Ct. 157, 46 L.Ed.2d 115]).

This unique dualism of personalty and realty interests has engendered numerous legal complexities in determining which property interest shall predominate in different types of **actions** involving co-operative apartments. Eschewing any rigid ***375** characterization of a co-operative apartment as either realty or personalty, even for purposes of uniformity, the Court of Appeals in *Shor,* though noting that the stock certificate and proprietary lease are "inseparably joined" and can not really "be viewed or valued in isolation from the other," nevertheless concluded that a determination of which property interest on a given issue dominates will depend on such factors as the manner or conduct of economic affairs at issue, the perceptions and expectations that members of society have in conducting their affairs, (citing Cardozo, *Nature of the Judicial Process,* pp. 60–64) and the interests being advanced by any statutes applicable or relevant to the subject matter before the court. *Shor, supra,* 43 N.Y.2d at 157, 400 N.Y.S.2d 805, 371 N.E.2d 523.

In *Shor* the Court determined that as far as statutory priorities of judgment creditors was concerned, the property interest of a judgment debtor in his co-operative apartment "fit better, legally and pragmatically, although with imperfect linguistic formulation, into the statutory framework governing personal property." *Id.* at 154, 400 N.Y.S.2d 805, 371 N.E.2d 523. The personal property interest of a co-operative apartment also assumed priority in the context of determining that UCC § 2–713 was applicable in measuring damages for breach of a contract of sale of the shares to a cooperative apartment. *Weiss v. Karch,* 62 N.Y.2d 849, 850, 477 N.Y.S.2d 615, 466 N.E.2d 155. However, the sale or conveyance of an interest in a co-operative apartment has been held to be a contract for the sale or conveyance of real property, thereby requiring a writing pursuant to the Statute of Frauds (GOL § 5–703). *Moloney v. Weingarten,* 118 A.D.2d 836, 837, 500 N.Y.S.2d 320, *lv. to appeal denied,* 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358. Similarly, the United States Supreme Court has ruled that the sale of stock of an apartment house cooperative corporation does not constitute the sale of a "security" for purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934 and should be treated instead as the sale of an interest in realty. *United Housing Foundation, Inc., v. Forman,* 421 U.S. 837, esp 854–860, 95 S.Ct. 2051, 2061–64, 44 L.Ed.2d 621 *reh. den.,* 423 U.S. 884, 96 S.Ct. 157, 46 L.Ed.2d 115; *Grenader v. Spitz,* 537 F.2d 612, esp 617–620, *cert. denied* 429 U.S. 1009, 97 S.Ct. 541, 50 L.Ed.2d 619.

[5] For our purposes, whether we deem the controlling aspect of a **partition** or sale of a co-operative apartment as the **partition** or sale of realty or of personalty, that determination will not hinder the power of the Supreme Court to issue a decree of **partition** or sale, since the court has jurisdiction ****297** under Article 9 of the RPAPL to order the **partition** or sale of a leasehold estate and has jurisdiction in equity to issue a ***376** decree of **partition** or sale of the stock. *See* discussion *ante.* The relevance of this discussion, then, is to clarify whether the **action** may be brought pursuant to Article 9 of the RPAPL and to provide uniformity of procedure.

Of major significance is the fact that a statutory procedure already exists in the RPAPL specifically governing the **partition** of leasehold estates. This comprehensive statutory

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framework should not be disregarded merely because the sale of stock will be an ancillary aspect of this **action**. Governed as it is by equitable principles, this statutory framework is flexible enough to accommodate this dual sale of personalty and realty interests. *Cf. Eisner v. Curiel, supra; Haight v. Haight, supra.* The advantage of uniformity of procedure additionally favors the commencement of these **actions** under the RPAPL.

Moreover, in reflecting on the expectations that co-owners of a co-operative apartment have with respect to their property interest and the personal conflicts which trigger an **action** for **partition**, common sense tells us that the differences arising between co-owners that would compel one owner to seek to alienate his property interest could have little, if anything, to do with their ownership of stock. Those differences will, in all likelihood, involve conflicts concerning such issues as use and occupancy of the apartment, disagreements as to each owner's respective financial obligations regarding the apartment, or disagreements as to entitlement to income tax deductions for payment of real property taxes or mortgage interest. Simply put, judicial intervention is sought because there has been a breakdown in the relationship between the co-owners impinging on their ability to enjoy peacefully their occupancy rights to the apartment, making the focus of the **action** for **partition**, quite naturally, the apartment, not the stock. There is absolutely no reason, then, not to have this **action** governed by Article 9 of the RPAPL.

One final point is that summary judgment should have been granted declaring that plaintiffs and defendant Chang have equal rights and interests in the 16 shares and the proprietary lease. From the shareholders' certificate, the pleadings and the parties' answers to interrogatories, there is no disputing that defendant Chang owns a one-half interest in the shares allocated to this apartment as a tenant in common with Chiang and Blomback, who together own the other half-interest as joint tenants.

Accordingly, the order of the Supreme Court, New York ***377** County (William P. McCooe, J.), entered May 28, 1987, which denied plaintiffs' motion for summary judgment and dismissed their complaint, should be reversed, on the law, without costs, summary judgment granted declaring that plaintiffs have equal rights and title with defendant Chang to the shares of stock allocated to their co-operative apartment and to the proprietary lease, and the matter remanded to a referee for further proceedings consistent herewith pursuant to Article 9 of the RPAPL.

Order, Supreme Court, New York County (William McCooe, J.), entered on May 28, 1987, unanimously reversed, on the law, without costs and without disbursements, summary judgment granted declaring that plaintiffs have equal rights and title with defendant Chang to the shares of stock allocated to their co-operative apartment, and to the proprietary lease, and the matter remanded to a referee for further proceedings consistent with this Court's Opinion herewith pursuant to Article 9 of the RPAPL.

All concur.

All Citations

137 A.D.2d 371, 529 N.Y.S.2d 294

Footnotes

1 A tenancy in common exists when two or more persons each own and possess an undivided interest in property, real or personal. *Tarbox v. Hulett,* 272 App.Div. 633, 635, 75 N.Y.S.2d 37. Joint tenants also own and possess an undivided interest in property, real or personal, but have the additional advantage of a right of survivorship. *Matter of McKelway,* 221 N.Y. 15, 19, 116 N.E. 348.

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46 A.D.3d 613
Supreme Court, Appellate Division,
Second Department, New York.

Louis Anthony GRAFFEO, appellant,
v.
Debra Carol PACIELLO, a/k/
a Debra Carol Graffeo, respondent.

Dec. 11, 2007.

Synopsis

Background: Tenant in common brought action for **partition** and sale of real property. The Supreme Court, Kings County, Partnow, J., denied plaintiff tenant's motion for summary judgment, and plaintiff tenant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] **partition** and sale was appropriate with respect to property that could not be equitably physically divided, and

[2] language in deed to tenants in common did not prohibit **partition**.

Reversed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (4)

[1] **Partition** Cotenancy or Other Common Interest of Parties

Partition Grounds for Determination

A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the **partition** of the property, and for a sale if it appears that a **partition** cannot be made without great prejudice to the owners. McKinney's **RPAPL** § **901**(1).

13 Cases that cite this headnote

[2] **Partition** Right to and Grounds for **Partition** in General

Partition Adjustment of Claims and Equities Between Parties

Tenant in common has right to maintain an action for **partition**, but the remedy is subject to the equities between the parties. McKinney's **RPAPL** § **901**.

9 Cases that cite this headnote

[3] **Partition** Grounds for Determination

Partition and sale of tenancy-in-common property was appropriate where property could not be physically **partitioned** into equal parts, language of deed did not prevent commencement of **partition** action, and equities did not favor tenant opposing sale. McKinney's **RPAPL** § **901**(1).

9 Cases that cite this headnote

[4] **Partition** Right to and Grounds for **Partition** in General

Language in deed conveying property to tenants in common, providing that property could only "be sold, encumbered or transferred with the written consent of both grantees" did not preclude the commencement of a **partition** action or other proceeding, where the parties could not agree or if one party unreasonably withheld its consent to the sale or alienation of the property. McKinney's **RPAPL** § **901**.

1 Cases that cite this headnote

Attorneys and Law Firms

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GABRIEL M. KRAUSMAN, J.P., STEVEN W. FISHER, DANIEL D. ANGIOLILLO, and RUTH C. BALKIN, JJ.

Opinion

***613** In an action for the **partition** and sale of real property, the plaintiff appeals from an order of the Supreme Court, Kings County (Partnow, J.), dated April 24, 2007, which denied his motion for summary judgment.

ORDERED that the order is reversed, on the law, with costs, and the plaintiff's motion for summary judgment is granted.

By deed dated July 9, 1976, the parties' maternal grandmother conveyed certain property consisting of a three-family multiple dwelling building located in Brooklyn (hereinafter the Property) to her granddaughter, the defendant, Debra Carol Paciello, a/k/a Debra Carol Graffeo, as sole fee owner. However, by "Warranty Deed ****265** with Full Covenants" dated August 1, 1978 (hereinafter the 1978 Deed), the defendant conveyed the property to herself and her brother, the plaintiff, Louis Anthony Graffeo, as tenants in common. The 1978 Deed contained the following restrictive covenant:

> "The grantees herein expressly understand and agree that the above property shall not be sold, encumbered or conveyed until their mother, Concettina Graffeo, shall die; and then the above property may only be sold, encumbered or transferred with the written consent of both grantees. During the life of Concettina Graffeo, all above restrictions may be removed with her signature & other grantees. The grantee, Louis Anthony Graffeo, is signing this deed as evidence of his consent to the foregoing, and his agreement to be bound by the foregoing restrictions."

The 1978 Deed containing both ***614** parties' signatures was duly notarized by its drafting attorney, Carl E. Tavolacci, Esq., on August 1, 1978, and recorded with the Official City Register, Kings County, on August 4, 1978.

In 2000 the defendant commenced an action against her mother, Concettina Graffeo, the plaintiff, and Tavolacci, seeking to set aside the 1978 Deed, claiming that her acknowledged signature on the 1978 Deed transferring sole ownership of the property to herself and her brother was forged by her mother. Two appeals to this Court ensued with respect to that action (*see Paciello v. Graffeo,* 8 A.D.3d 543, 779 N.Y.S.2d 526; 32 A.D.3d 461, 819 N.Y.S.2d 480). Ultimately, the action was dismissed, as the defendant failed "to come forward with proof of the nature required to rebut the presumption of due execution arising from the certificate of acknowledgment" of the attorney who drafted the 1978 Deed and notarized her signature (*Paciello v. Graffeo,* 32 A.D.3d 461, 462, 819 N.Y.S.2d 480). Thus, the 1978 Deed to the Property in both the plaintiff and defendant's names remained valid.

[1] **[2]** By summons and verified complaint dated June 17, 2003, the plaintiff commenced the instant action against the defendant for "a judgment of **partition** pursuant to the Real Property Actions and Proceedings Law together with costs and disbursements of this action." In his verified complaint, the plaintiff alleged that their mother had passed away and, therefore, the Property was no longer subject to any restrictions and should be **partitioned** and sold at a public auction, given the fact that it cannot be physically **partitioned** in equal parts. He thereafter moved for summary judgment in his favor, and the Supreme Court denied the motion. We reverse. "A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the **partition** of the property, and for a sale if it appears that a **partition** cannot be made without great prejudice to the owners" (**RPAPL 901** [1]; *see Donlon v. Diamico,* 33 A.D.3d 841, 842, 823 N.Y.S.2d 483; *Wilbur v. Wilbur,* 266 A.D.2d 535, 536, 699 N.Y.S.2d 103; *Ferguson v. McLoughlin,* 184 A.D.2d 294, 295, 584 N.Y.S.2d 816; *Bufogle v. Greek,* 152 A.D.2d 527, 528, 543 N.Y.S.2d 152). "[I]t is not accurate to say that **partition** is an absolute right of a tenant in common (*cf.* 2 Tiffany, Law of Real Property [3d ed.], § 474). The statute confers on a tenant in common the right to maintain an action for **partition** (**RPAPL 901**), but the remedy has always been subject to the equities between the parties" (*Ripp v. Ripp,* 38 A.D.2d 65, 68, 327 N.Y.S.2d 465, *affd. on op. below* ****266** 32 N.Y.2d 755, 344 N.Y.S.2d 950, 298 N.E.2d 114; *see Stressler v. Stressler,* 193 A.D.2d 728, 597 N.Y.S.2d 712).

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[3] Here, the plaintiff established his entitlement to summary judgment directing that the real property be **partitioned** and ***615** sold at public auction, by establishing his ownership and right to possession of the subject Property (*see* **RPAPL 901**[1]; *Dalmacy v. Joseph,* 297 A.D.2d 329, 330, 746 N.Y.S.2d 312) and showing that the Property was "so circumstanced that a **partition** thereof cannot be made without great prejudice to the owners" (*Chittenden v. Gates,* 18 App.Div. 169, 173, 45 N.Y.S. 768; *see* **RPAPL 901** [1]). It cannot be said that the equities favor the defendant's position (*see* *Bentley v. Dox,* 12 A.D.3d 1187, 785 N.Y.S.2d 253; *cf.* *Ripp v. Ripp,* 38 A.D.2d at 68–69, 327 N.Y.S.2d 465).

[4] In opposing the plaintiff's motion for summary judgment, the defendant failed to demonstrate the existence of a triable issue of fact (*see Russo Realty Corp. v. Katz,* 211 A.D.2d 673, 622 N.Y.S.2d 458). Her argument that the restrictive language of the 1978 Deed prohibits the alienation of the property without the parties' consent was inappropriately raised before the Supreme Court for the first time in a self-entitled "Supplemental Affidavit," which was, in effect, an improper sur-reply affirmation (*see* CPLR 2214; *Flores v. Stankiewicz,* 35 A.D.3d 804, 827 N.Y.S.2d 281; *Mu Ying Zhu v. Zhi Rong Lin,* 1 A.D.3d 416, 417, 766 N.Y.S.2d 897; *Voytek Tech. v. Rapid Access Consulting,* 279 A.D.2d 470, 719 N.Y.S.2d 112). In any event, the 1978 Deed language does not expressly preclude the commencement of a **partition** action or other proceeding, where the parties could not agree, or if a party unreasonably withheld its consent to the sale or alienation of the Property (*see* *Chiang v. Chang,* 137 A.D.2d 371, 372, 529 N.Y.S.2d 294, citing *Chew v. Sheldon,* 214 N.Y. 344, 348–349, 108 N.E. 552).

All Citations

46 A.D.3d 613, 848 N.Y.S.2d 264, 2007 N.Y. Slip Op. 09724

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89 A.D.3d 1261
Supreme Court, Appellate Division,
Third Department, New York.

Mary Jane HALES, Appellant,
v.
Timothy ROSS, Respondent.

Nov. 10, 2011.

Synopsis
Background: Tenant in common brought action to compel sale of real property and reimbursement for moneys she expended in maintaining it. The Supreme Court, Saratoga County, Ferradino, J., directed **partition** of property, and plaintiff appealed.

[Holding:] The Supreme Court, Appellate Division, Egan Jr., J., held that record supported referee's decision to **partition** property.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Partition** **Actual Partition** or Sale
Partition Grounds for determination
Partition Pleading and proof

When tenant in common seeks **partition** or sale of jointly-owned real property, **actual** physical division of property is preferred and is presumed to be appropriate absent showing that physical **partition** results in great prejudice to owners, in which case property must be sold at public auction. McKinney's **RPAPL** § **901**(1).

3 Cases that cite this headnote

[2] **Partition** Reference of question

Whether physical **partition** or sale of jointly-owned property is appropriate is question of fact for referee to resolve, and referee's determination is entitled to great weight and should be confirmed if supported by record as a whole. McKinney's **RPAPL** § **901**(1).

3 Cases that cite this headnote

[3] **Partition** Grounds for determination

Record supported referee's decision to **partition** jointly-owned real property into two parcels, despite one owner's contention that property's highest and best use was for it to remain intact as single parcel of land because of current two-acre minimum lot size for property surrounding lake and uncertainty associated with obtaining necessary variances if property was subdivided, where competing appraisals, although differing as to how property ought to be viewed and precise manner in which it ought to be divided, did not result in vastly dissimilar pre- or post-**partition** valuations, owner failed to establish that application of local zoning ordinance militated against **partition**, and easement granting one party access over other's property would have been ill advised.

Attorneys and Law Firms

****264** David A. Harper, Saratoga Springs, for appellant.

Snyder, Kiley, Toohey, Corbett & Cox, L.L.P., Saratoga Springs (James S. Cox of counsel), for respondent.

Before: MERCURE, J.P., MALONE JR., KAVANAGH, McCARTHY and EGAN JR., JJ.

Opinion

EGAN JR., J.

***1262** Appeal from an order and judgment of the Supreme Court (Ferradino, J.), entered September 24, 2010 in Saratoga County, which, in an action pursuant to **RPAPL** article 9, among other things, directed the **partition** of certain real property owned by the parties as tenants in common.

Beginning in 1953, the parties' father acquired three separate parcels of land located on Stockholm Road in the City of Saratoga Springs, Saratoga County, totaling approximately

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2.18 acres. Parcel 1 (.07 acre) lies to the south of Stockholm Road and contains an unheated seasonal residence built in the 1950s. Parcel 2 (.79 acre), located across the street from Parcel 1, contains an in-ground swimming pool and enjoys approximately 124 feet of lakefront on Saratoga Lake. Parcel 3 (1.32 acres), which abuts Parcel 2 to the west and does not have access to the lake, is improved by a year-round residence built in the 1970s. In 1979, the parties' father conveyed all three parcels to plaintiff and defendant as joint tenants with a right of survivorship and, several years later, the parties reconveyed the property to themselves as tenants in common. [1]

Although the parties each initially enjoyed use of the property and split the various expenses associated therewith, their relationship eventually soured, prompting them to enter into a series of conversations regarding the possibility of one of them purchasing the other's interest in the property. [2] These negotiations proved unsuccessful and, ultimately, plaintiff commenced this action pursuant to **RPAPL** article 9 seeking, among other things, to compel a sale of the property and reimbursement for the moneys she expended in maintaining the property after May 2001. Defendant answered and requested that the property be **partitioned**.

Following a hearing, a Referee determined that the property should be **partitioned** into two new parcels by allocating a portion of Parcel 2 to each of the remaining original parcels. This allocation resulted in plaintiff retaining the seasonal residence, the swimming pool and approximately one half of the usable lakefront and defendant retaining the year-round residence and the balance of the lakefront. ****265** Plaintiff's request for reimbursement of the various property expenses paid after May 2001 was denied based upon her failure to adequately document her expenditures. Supreme Court confirmed the Referee's report, and this appeal by plaintiff followed.

[1] **[2]** ***1263** We affirm. When a tenant in common seeks **partition** or a sale of real property pursuant to **RPAPL 901**(1), the **actual** physical division of the property is preferred and, indeed, is presumed to be appropriate absent a showing that physical **partition** results in "great prejudice" to the owners, in which case the property must be sold at public auction (*see* **RPAPL 901** [1]; 915; *Lauriello v. Gallotta,* 70 A.D.3d 1009, 1010, 895 N.Y.S.2d 495 [2010]; *Loughran v. Cruickshank,* 8 A.D.3d 799, 800, 778 N.Y.S.2d 225 [2004]; *Ferguson v. McLoughlin,* 184 A.D.2d 294, 294, 584 N.Y.S.2d 816 [1992], *appeal dismissed* 80 N.Y.2d 972, 591 N.Y.S.2d 140, 605 N.E.2d 876 [1992]). Whether physical **partition** or sale is appropriate is a question of fact for the Referee to resolve (*see Snyder Fulton St., LLC v. Fulton Interest, LLC,* 57 A.D.3d 511, 513, 868 N.Y.S.2d 715 [2008], *lv. dismissed* 12 N.Y.3d 755, 876 N.Y.S.2d 703, 904 N.E.2d 840 [2009]; *Loughran v. Cruickshank,* 8 A.D.3d at 800, 778 N.Y.S.2d 225), and the Referee's determination in this regard is entitled to great weight and should be confirmed if supported by the record as a whole (*see Loughran v. Cruickshank,* 8 A.D.3d at 800, 778 N.Y.S.2d 225; *Matter of Blue Circle v. Schermerhorn,* 235 A.D.2d 771, 772, 652 N.Y.S.2d 817 [1997]).

Initially, plaintiff's appraiser, according significant weight to the fact that the three parcels bore a single tax identification number, appraised the property as a single 2.18–acre lot valued at $750,000. Plaintiff's appraiser further testified that, in view of the current two-acre minimum lot size for property surrounding Saratoga Lake and the uncertainty associated with obtaining the necessary variances should the property be "subdivided" into individual lots, the highest and best use of the property was for it to remain intact as a single parcel of land. [3] Defendant's appraiser, on the other hand, relying upon the manner in which the parties' father acquired each of the three parcels and the separate lot descriptions retained in the deed conveying those parcels to plaintiff and defendant, valued each of the three parcels independently and arrived at a collective value of $715,000.

Confronted with competing appraisals and divergent points of view regarding the most appropriate characterization and use of the property, the Referee instructed the appraisers to revisit their valuations and determine if the property could be **partitioned** in such a fashion as to equalize the value of the two resulting parcels. In response, plaintiff's appraiser, utilizing the land contained in Parcel 2, divided the property into a 1.86–acre parcel and a .32–acre parcel. This configuration, which assumed that the swimming pool would be filled in, granted the 1.86–acre parcel access to the lake (but not **actual** lakefront) and was appraised at $350,000. The remaining .32 acre included all of the ***1264** lakefront and was valued at $375,000. Defendant's appraiser also allocated portions of Parcel 2 to each of the remaining parcels but did so in such a way as to grant **actual** lakefront to each of the **partitioned** parcels. Specifically, defendant's appraiser created a .63–acre parcel (containing the seasonal residence, the swimming pool and ****266** 65 feet of lakefront) and a 1.32–acre parcel (containing the year-round residence and 60 feet of lakefront) and valued each of the newly **partitioned**

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parcels at $400,000.[4] Upon due consideration, the Referee adopted the latter proposal and awarded plaintiff the .63–acre parcel and awarded defendant the 1.32–acre parcel, which abuts his current property.

[3] Although plaintiff argues on appeal that this results in great prejudice and that the entire 2.18 acres should be sold at auction as a single parcel of land, we do not agree. The competing appraisals, although differing as to how the property should be viewed and the precise manner in which it should be divided, did not result in vastly dissimilar pre- or post-**partition** valuations (*compare Snyder Fulton St., LLC v. Fulton Interest, LLC,* 57 A.D.3d at 513–514, 868 N.Y.S.2d 715). Hence, we cannot say that "the aggregate value of the several parts when held by different individuals in severalty would be materially less than the whole value of the property if owned by one person" (*id.* at 513, 868 N.Y.S.2d 715 [internal quotation marks and citations omitted]). Further, despite some uncertainty in this regard, plaintiff's proof fell short of establishing that application of the local zoning ordinance militated against **partition** and/or resulted in great prejudice to the parties. Finally, although neither appraiser necessarily favored dividing the lakefront, given the parties' current relationship, we agree that an easement granting one party access over the property of the other is ill advised.

As to plaintiff's request for reimbursement of the various expenses she incurred after May 2001, we agree that the documentation submitted by plaintiff, which did not include any **actual** bills or canceled checks, was insufficient to support her claimed expenditures. Accordingly, we have no quarrel with Supreme Court's decision to confirm the Referee's report, which, in our view, finds ample support in the record. Plaintiff's remaining arguments, to the extent not specifically addressed, have been examined and found to be lacking in merit.

***1265** ORDERED that the order and judgment is affirmed, without costs.

MERCURE, J.P., MALONE JR., KAVANAGH and McCARTHY, JJ., concur.

All Citations

89 A.D.3d 1261, 932 N.Y.S.2d 263, 2011 N.Y. Slip Op. 07892

Footnotes

1 In the interim, defendant purchased—and constructed a residence on—a parcel of land abutting Parcel 3.

2 Additionally, in May 2001, defendant sent plaintiff a letter indicating that, with the exception of one half of the school and property taxes, he no longer would pay any expenses associated with the property.

3 This opinion lies at the heart of plaintiff's present claim that **partitioning** of the property results in great prejudice.

4 Although not addressed by either the Referee or Supreme Court, the total acreage under this proposal (1.95 acres) falls short of the **actual** total acreage of the combined parcels (2.18 acres), leaving a gap of .23 acre. According to the parties, this unallocated acreage consists of wetlands and will be addressed during the course of the contemplated survey of the property.

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70 A.D.3d 1009
Supreme Court, Appellate Division,
Second Department, New York.

Christopher M. LAURIELLO,
etc., et al., respondents,
v.
Martha GALLOTTA, appellant, et al., defendants.

Feb. 23, 2010.

Synopsis

Background: Plaintiffs brought action for the **partition** of real property. The Supreme Court, Kings County, Jacobson, J., granted plaintiffs' motion for property appraisal, and placement of property on open market for immediate sale upon receipt of appraisal. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] interlocutory judgment was required before **partition** or sale of property could be ordered, and

[2] statute required that property placed for sale pursuant to **partition** law be at public auction.

Affirmed as modified.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Partition** Interlocutory judgment or decree in general

Partition Determination as to rights of parties in property

Interlocutory judgment was required to determine each tenant in common's rights, shares, or interests in certain real property before **partition** or sale of property could be ordered in action for **partition**. McKinney's RPAPL § 915.

9 Cases that cite this headnote

[2] **Partition** Grounds for determination

Partition Pleading and proof

The actual physical **partition** of property is the preferred method of resolving an action for **partition** and is presumed appropriate unless one party demonstrates that actual physical **partition** would cause **great** **prejudice**, in which case the property must be sold at public auction. McKinney's RPAPL § 915.

9 Cases that cite this headnote

[3] **Partition** Manner and conduct in general

Statute providing that sale of real property pursuant to a judgment affecting property's title or the possession, use or enjoyment of property must be at public auction to the highest bidder required that property placed for sale pursuant to **partition** law be at public auction, and thus trial court erred in authorizing referee to place property on the open market for immediate sale in **partition** action. McKinney's RPAPL §§ 231(1), 915.

4 Cases that cite this headnote

[4] **Partition** Officers, commissioners, and referees to make **partition** or sale

Appraisal of real property at issue in **partition** action could establish minimum selling price or enable determination of whether an equal or equalized **partition** could be made, and thus trial court did not err in authorizing referee to obtain appraisal on property at issue in **partition** action. McKinney's RPAPL § 915.

Attorneys and Law Firms

****496** Howard W. Rachlin, New York, N.Y., for appellant.

Michael J. Good, Brooklyn, N.Y., for respondents.

REINALDO E. RIVERA, J.P., MARK C. DILLON, ARIEL E. BELEN, and SHERI S. ROMAN, JJ.

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Opinion

***1009** In an action, inter alia, for the **partition** of real property, the defendant Martha Gallotta appeals from stated portions of an order of the Supreme Court, Kings County (Jacobson, J.), dated October 31, 2008, which, among other things, granted those branches of the plaintiffs' motion which were to authorize a referee to appraise the subject real property, and to place the real property on the market for immediate sale as soon as a final report is prepared and an appraisal is rendered.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the plaintiffs' motion which was to authorize the referee to place the subject real property on the market for immediate sale as soon as a final report is prepared and an appraisal is rendered, and substituting therefor a provision denying that branch of the plaintiffs' motion and directing the referee to report to the Supreme Court, Kings County, as to the right, share, or interest of each party in the property; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiffs.

[1] The defendant correctly contends that the Supreme Court erred in granting that branch of the plaintiffs' motion which was to authorize the referee to place the subject property on the market for immediate sale as soon as a final report is prepared and an appraisal is rendered. RPAPL 915 provides that, in an action for **partition**, an interlocutory judgment shall determine "the right, share, or interest of each party in the property." Where the property was so circumstanced that a **partition** thereof could not be made without **great prejudice** to the owners, the interlocutory judgment shall direct that the property be sold at public auction. Otherwise, the interlocutory judgment in favor of the plaintiff shall direct that **partition** be made between the parties according to their respective right, share, or interest.

[2] Here, there has been no interlocutory judgment determining the right, share, or interest of each party in the subject property. While it has been established that the parties are tenants ***1010** in common to the property, their disagreements as to their respective rights, shares, or interests in this property remain unresolved. Such issues as the rights, shares, or interests of the parties, and whether **partition** may be had without **great prejudice**, should be determined and declared by the court, after the referee reports to the court on these issues, before a **partition** or sale may be directed (*see Wolfe v. Wolfe,* 187 A.D.2d 628, 629, 590 N.Y.S.2d 504; *Grossman v. Baker,* 182 A.D.2d 1119, 583 N.Y.S.2d 92; *George v. Bridbord,* 113 A.D.2d 869, 493 N.Y.S.2d 794). The actual physical **partition** of property is the preferred method and is presumed appropriate ****497** unless one party demonstrates that actual physical **partition** would cause **great prejudice**, in which case the property must be sold at public auction (*see Snyder Fulton St., LLC v. Fulton Interest, LLC,* 57 A.D.3d 511, 513, 868 N.Y.S.2d 715; *Loughran v. Cruickshank,* 8 A.D.3d 799, 800, 778 N.Y.S.2d 225).

[3] Furthermore, the Supreme Court erred in granting that branch of the plaintiffs' motion which was to authorize the referee to place the property on the market for immediate sale. If the property is placed for sale, the sale must be at public auction pursuant to RPAPL 231(1), which provides that a sale of real property in pursuance of a judgment affecting the title to, or the possession, use or enjoyment of, real property, shall be at public auction to the highest bidder. The Supreme Court should have denied that branch of the plaintiffs' motion and directed the referee to report as to the rights, shares, or interests of the parties in the property.

[4] However, it was not error for the Supreme Court to authorize the referee to obtain an appraisal of the property before its sale. An appraisal might enable the referee to establish a minimum selling price, or to determine whether an equal or equalized **partition** can be made (*see Colley v. Romas,* 50 A.D.3d 1338, 857 N.Y.S.2d 260).

The appellant's remaining contention is without merit.

All Citations

70 A.D.3d 1009, 895 N.Y.S.2d 495, 2010 N.Y. Slip Op. 01622

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8 A.D.3d 799
Supreme Court, Appellate Division,
Third Department, New York.

Sara A. LOUGHRAN et al., Respondents,
v.
Robert F. CRUICKSHANK, Appellant.

June 10, 2004.

Synopsis

Background: Siblings who owned **property** as tenants in **common** filed lawsuit to direct the sale of the **property** as one parcel. Defendant, as one tenant in **common**, counterclaimed, demanding an accounting, based on alleged disproportionate contribution to **property's** upkeep, and seeking **partition**. The Supreme Court, Ulster County, Connor, J., directed sale of **property** as one parcel. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, Kane, J., held that: **property** was required to be sold as one parcel, rather than **partitioned**.

Affirmed.

West Headnotes (4)

[1] **Partition** Grounds for Determination

Whether **partition** or sale of real **property** owned as tenants in **common** is appropriate is a question of fact. McKinney's RPAPL §§ 901, subd. 1, 915.

1 Cases that cite this headnote

[2] **Partition** Reference of Question

The Referee's determination as to whether real **property** owned as tenants in **common** should be **partitioned** or sold as one parcel is entitled to great weight, especially where conflicting testimony and credibility matters are at issue, and should be confirmed if the reported findings are supported by the record. McKinney's RPAPL §§ 901, subd. 1, 915.

4 Cases that cite this headnote

[3] **Partition** Grounds for Determination

Real **property** owned as tenancy in **common** was required to be sold as one parcel, rather than **partitioned**; expert witness testified that rights-of-way between parcels and to roadway were of questionable validity, and if **property** were **partitioned**, only owner of one parcel would have road access and others would be landlocked, value of timber on land would be greatly diminished if it was **partitioned**, since larger parcels would permit greater flexibility in harvesting, as compared to smaller parcels, timber was not distributed **equitably** among the parcels, and appraiser opined that **property** would decrease in value if divided, so that **partition** could not be accomplished without great prejudice to owners. McKinney's RPAPL §§ 901, subd. 1, 915, 943.

3 Cases that cite this headnote

[4] **Partition** Grounds for Determination

Possible capital gains tax ramifications of a sale and possibility that bids at sale would be lower than appraised value of **property** are irrelevant to the determination of whether **partition** of **property** owned as tenancy in **common** would greatly prejudice the owners. McKinney's RPAPL §§ 901, subd. 1, 915, 943.

2 Cases that cite this headnote

Attorneys and Law Firms

****226** Hacker & Murphy L.L.P., Latham (Patrick L. Seely Jr. of counsel), for appellant.

McNamee, Lochner, Titus & Williams, Albany (Christopher Massaroni of counsel), for respondents.

Before: CARDONA, P.J., PETERS, SPAIN, ROSE and KANE, JJ.

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Opinion

***799** KANE, J.

Appeal from a judgment of the Supreme Court (Connor, J.), entered January 23, 2003 in Ulster County, which, in an action pursuant to RPAPL article 9, directed the sale of certain real **property** owned by the parties as tenants in **common**.

The parties are siblings who own, as tenants in **common** with undivided one-third interests, a 1,250–acre tract of real **property** located in the Catskill Mountains. The **property** was acquired piecemeal by the parties' ancestors over the last 100 years as 11 separate parcels. It is currently one of the largest privately-owned tracts in the Catskills. It is largely undeveloped, but contains a house, garage with upstairs apartment and a barn. Plaintiffs use this house and the **property** seasonally. Defendant owns a 0.6–acre parcel within the **property**, where he lives year round. Defendant's home is located near a private road connecting the **property** to a public roadway. The **property** has no other practical road frontage. Its topography varies greatly, including gullies, steep inclines, plateaus, heavily wooded areas, rough logging roads, a creek designated by the state as a class A trout stream, and Balsam Mountain, one of the Catskill Mountains high peaks. Valuable timber is located on several parcels, although the species and quantity diverge greatly among the parcels. Rights-of-way over privately-owned ****227** land to several of the parcels making up the **property** are of questionable validity.

Plaintiffs commenced this RPAPL article 9 action seeking to have the **property** sold as one parcel. Defendant answered and counterclaimed, demanding an accounting based on disproportionate contribution to the **property's** upkeep, and seeking **partition**. After a hearing, the Referee recommended that the **property** ***800** be sold as one parcel. Supreme Court confirmed the Referee's report, resulting in defendant's appeal.

[1] **[2]** Supreme Court properly ordered a sale of the **property** rather than **partition**. Tenants in **common** can maintain an action for **partition** of real **property** or "for a sale if it appears that a **partition** cannot be made without great prejudice to the owners" (RPAPL 901[1]). **Partitioning** the **property** is the preferred method and is presumed appropriate unless one party demonstrates that actual physical division would cause great prejudice to the owners, in which case the **property** must be sold at public auction (*see* RPAPL 915; *Vlcek v. Vlcek,* 42 A.D.2d 308, 310–311, 346 N.Y.S.2d 893 [1973]). Whether **partition** or sale is appropriate is a question of fact (*see Macy v. Nelson,* 62 N.Y. 638 [1875]). The Referee's determination is entitled to great weight, especially where conflicting testimony and credibility matters are at issue, and should be confirmed if the reported findings are supported by the record (*see Frater v. Lavine,* 229 A.D.2d 564, 564, 646 N.Y.S.2d 46 [1996]; *Schwartz v. Meisner,* 198 A.D.2d 634, 634–635, 603 N.Y.S.2d 626 [1993]; *Bellnier v. Bellnier,* 158 A.D.2d 947, 948, 550 N.Y.S.2d 963 [1990]).

[3] Here, the Referee specifically credited the testimony of plaintiffs' expert regarding the invalidity or seriously questionable legality of the rights-of-way. Owners should have indisputable access to their **property** and not have to rely on rights-of-way which are suspect or may require litigation to enforce (*compare Bellnier v. Bellnier, supra* at 948–949, 550 N.Y.S.2d 963). There is only one feasible means of ingress and egress, that being the private road leading to the **property** nearest defendant's house. If the **property** were divided, presumably only the owner of one parcel would have road access and the other two would be landlocked. Although the court can impose easements over some portions of the divided **property** in favor of the other current tenants in **common** for their newly-divided parcels (*see Lombardi v. Lombardi,* 63 A.D.2d 1111, 1112, 406 N.Y.S.2d 396 [1978]), the lack of access and burden on the owner of the newly servient parcel is relevant to whether great prejudice **exists** (*see Macy v. Nelson, supra* at 638–639). Lack of access would affect logging feasability. The value of the timber would also be diminished if the **property** is divided, since the larger tract permits greater flexibility in harvesting and creates an economy of scale not present in smaller parcels. It would be extremely difficult to divide the **property** into parcels which would **equitably** distribute the timber; certain parcels are virtually unharvestable while others have large quantities of timber, and more valuable species are concentrated on certain parcels.

Plaintiffs' real estate appraiser opined that the **property** would decrease in value if it was divided. Despite defendant's ***801** arguments that there was no foundation for this opinion, it is difficult to establish a precise value for smaller parcels without knowing how the parcels would be divided or configured. The expert provided a range for the decrease and the factors upon which he based his opinion. On the other hand, defendant's real estate appraiser created his own possible division ****228** and opined that his division would slightly increase the value. This expert's potential division

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was skewed because the parcels were extremely divergent in size, with parcels measuring 94 acres, 257 acres and 949 acres and, in value, estimated at $232,000, $252,000, and $570,000, respectively. While the **property** need not be **partitioned** into equal parcels and the court can order a monetary award to equalize slight divergence in the value of divided parcels (*see* RPAPL 943), the great disparity in size and value of the parcels created by the defense expert's division goes to the weight of his opinion and the issue of great prejudice. Defendant's expert also formed his opinion of values and divisibility with the assumption that the rights-of-way were valid or enforceable, but the Referee found this assumption unwarranted and unsupported by the facts. Lack of access to newly created parcels would make them less valuable or perhaps even unmarketable, which implies great prejudice and the unsuitability of **partition** (*see Ferguson v. McLoughlin,* 184 A.D.2d 294, 295, 584 N.Y.S.2d 816 [1992], *appeal dismissed* 80 N.Y.2d 972, 591 N.Y.S.2d 140, 605 N.E.2d 876 [1992]).

Defendant's argument that he will be displaced is inaccurate. He alone owns the parcel containing his home, so he will not actually be displaced. Although he will no longer have use of the barn and the remaining co-owned tract, he was always aware that he owned that in **common** with his sisters and did not have absolute use or control over that **property**. One owner cannot dictate the outcome of the proceeding based on his residence on 0.6 acres within a 1,250 acre tract and, in any event, courts have ordered a sale rather than **partition** based on the overall circumstances even if an owner would be displaced (*see id.*).

[4] It is irrelevant that the owners may receive a much lower bid at public auction than the **property's** appraised value. If the court finds that **partition** would result in great prejudice it must order that the **property** be sold at public auction (*see* RPAPL 915). Despite some testimony that public auctions attract low bidders, testimony also indicated that this particular type of sale would likely attract better bidders than the typical public auction, a foreclosure sale, and that the parties could increase the bids through good advertising and a sealed bid process. The possible capital gains tax ramifications of a sale are similarly irrelevant to the determination of whether **partition** would greatly ***802** prejudice the parties (*see Rosanoff v. Skura,* 50 Misc.2d 1090, 1091–1092, 272 N.Y.S.2d 621 [1966]).

Based on the **property's** varied topography and characteristics, and lack of viable access to several of the parcels, the Referee and Supreme Court properly found that **partition** could not be accomplished without great prejudice to the owners (*see Macy v. Nelson, supra; cf. Chittenden v. Gates,* 18 App.Div. 169, 45 N.Y.S. 768 [1897]). Accordingly, the court properly ordered a sale of the **property** as one parcel.

ORDERED that the judgment is affirmed, with costs.

CARDONA, P.J., PETERS, SPAIN and ROSE, JJ., concur.

All Citations

8 A.D.3d 799, 778 N.Y.S.2d 225, 2004 N.Y. Slip Op. 04826

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74 A.D.3d 667
Supreme Court, Appellate Division,
First Department, New York.

Fabrizio MANGANIELLO, Plaintiff–Appellant,
v.
Donna LIPMAN, etc., Defendant–Respondent.

June 24, 2010.

Synopsis

Background: Former husband sued his former wife for **partition** and use and occupancy of parties' condominium. The Supreme Court, New York County, Richard F. Braun, J., denied former husband's motion for summary judgment, and granted former wife's cross-motion for summary judgment. He appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] judgment of divorce did not bar the action;

[2] former husband was entitled to **partition** and sale of the condominium;

[3] former husband was entitled to an accounting following **partition** and sale of the condominium; and

[4] former husband failed to demonstrate his ouster from the condominium, as required to support his claim for use and occupancy.

Affirmed as modified.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] **Divorce** Property not disposed of by judgment or decree

Judgment of divorce did not bar former husband's action against his former wife for **partition** and use and occupancy of parties' condominium, which was gifted to the couple during their marriage by former wife's parents, where parties did not apprise matrimonial court that they owned marital property, divorce judgment and underlying orders did not explicitly address disposition of the condominium, and there was no basis to infer from generalized property division language of the pleadings in divorce action that the condominium was left solely to former wife, particularly since former husband's name remained on the deed.

[2] **Partition** Right to and grounds for **partition** in general

Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical **partition** of the property or **partition** and sale when he or she no longer wishes to jointly use or own the property. McKinney's RPAPL § 901(1).

9 Cases that cite this headnote

[3] **Partition** Right to and grounds for **partition** in general

The right to seek **partition** is not absolute and may be precluded where the equities so demand, or where **partition** would result in prejudice. McKinney's RPAPL § 901(1).

6 Cases that cite this headnote

[4] **Partition** Right to and grounds for **partition** in general

Former husband was entitled to **partition** and sale of condominium which was gifted to him and his former wife during their marriage by former wife's parents, although he never contributed to purchase of the condominium, former wife solely contributed to the property's maintenance and upkeep since his departure, and she had continuously occupied the condominium since that time, where former husband had ownership interest in, and right to possession of, the condominium, and physical **partition** alone could not be made without great prejudice. McKinney's RPAPL § 901(1).

4 Cases that cite this headnote

[5] **Judgment** Domestic relations

Partition Pleading and proof to authorize incidental relief

Former husband was entitled to an accounting following **partition** and sale of condominium which was gifted to him and his former wife during their marriage by former wife's parents, where former wife rebutted presumption that incident to **partition** and sale, he was entitled to an equal share of the net proceeds, since after his voluntary departure from the premises she had solely contributed to its maintenance and upkeep; further, parties' equitable share of the net proceeds was not amenable to resolution by summary judgment.

3 Cases that cite this headnote

[6] **Property** Disseisin, adverse possession, and ouster

Former husband failed to demonstrate his ouster from condominium which was gifted to him and his former wife during their marriage by former wife's parents, as required to support his claim for use and occupancy of the condominium.

Attorneys and Law Firms

****154** Lombardi & Salerno PLLC, New York (Dino J. Lombardi of counsel), for appellant.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heights (Anthony F. Prisco of counsel), for respondent.

ANDRIAS, J.P., CATTERSON, RENWICK, RICHTER, ROMÁN, JJ.

Opinion

***667** Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 23, 2009, which, insofar as appealed from, as limited by the briefs, granted defendant's cross motion for summary ***668** judgment dismissing the complaint and denied plaintiff's motion for summary judgment on his claims for **partition** and use and occupancy, unanimously modified, on the law, to the extent that defendant's cross-motion is denied as to plaintiff's claim for **partition**, the claim is reinstated, plaintiff's motion for summary judgment on that claim is granted, the matter remanded for further proceedings to include an accounting, and otherwise affirmed, without costs.

****155** [1] The judgment of divorce does not bar this action for **partition** of the parties' condominium, which was gifted to the couple during their marriage by defendant's parents. Because the parties did not apprise the matrimonial court that they owned marital property, the judgment and underlying orders do not explicitly address the disposition of the condominium, and there is no basis to infer from the generalized property division language of the pleadings in the divorce action that the condominium was left solely to defendant, particularly since plaintiff's name remains on the deed (*see e.g. Ehrgott v. Buzerak,* 49 A.D.3d 681, 682–683, 857 N.Y.S.2d 574 [2008]).

[2] [3] Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical **partition** of the property or **partition** and sale when he or she no longer wishes to jointly use or own the property (*Chew v. Sheldon,* 214 N.Y. 344, 348, 108 N.E. 552 [1915]; *Chiang v. Chang,* 137 A.D.2d 371, 373, 529 N.Y.S.2d 294 [1988]; *Ferguson v. McLoughlin,* 184 A.D.2d 294, 294, 584 N.Y.S.2d 816 [1992], *appeal dismissed* 80 N.Y.2d 972, 591 N.Y.S.2d 140, 605 N.E.2d 876 [1992]; *Ripp v. Ripp,* 38 A.D.2d 65, 68, 327 N.Y.S.2d 465 [1971], *affd.* 32 N.Y.2d 755, 344 N.Y.S.2d 950, 298 N.E.2d 114 [1973]). The right to seek **partition** however, is not absolute and may be precluded where the equities so demand (*Graffeo v. Paciello,* 46 A.D.3d 613, 614, 848 N.Y.S.2d 264 [2007], *lv. dismissed* 10 N.Y.3d 891, 861 N.Y.S.2d 263, 891 N.E.2d 297 [2008]; *Ripp* at 68, 327 N.Y.S.2d 465), or where **partition** would result in prejudice (*Ferguson* at 294, 584 N.Y.S.2d 816; *Ranninger v. Pevsner,* 306 A.D.2d 20, 20, 759 N.Y.S.2d 661 [2003]; *Piccirillo v. Friedman,* 244 A.D.2d 469, 469–470, 664 N.Y.S.2d 104 [1997]).

[4] Plaintiff, by demonstrating his ownership, his right to possession of the subject condominium, and that physical **partition** alone could not be made without great prejudice, established his prima facie entitlement to summary judgment on his claim for **partition** and sale of the instant property (*see* RPAPL 901[1]; *Graffeo* at 614–615, 848 N.Y.S.2d 264;

Donlon v. Diamico, 33 A.D.3d 841, 842, 823 N.Y.S.2d 483 [2006]). Defendant, by merely averring that plaintiff never contributed to the purchase of the premises, that she has solely contributed to the property's maintenance and upkeep since defendant's departure from the same, and that she has continuously occupied the condominium since that time, fails to controvert plaintiff's ownership interest (*see* ***669** *Barol v. Barol,* 95 A.D.2d 942, 943, 464 N.Y.S.2d 561 [1983]) and fails to establish that the equities favor dismissal of the action (*Ferguson* at 294–295, 584 N.Y.S.2d 816 [equities did not warrant denial of **partition** action when defense was nothing more than the adverse consequences which would befall defendant if **partition** was ordered]; *Bufogle v. Greek,* 152 A.D.2d 527, 528, 543 N.Y.S.2d 152 [1989] [that proponent of **partition** did not contribute to purchase of property or to its carrying costs was not a valid defense to **partition** action]). Thus, plaintiff's motion for summary judgment is granted and defendant's cross-motion for the same relief is denied.

[5] To the extent that defendant contends that since plaintiff's voluntary departure from the premises she has solely contributed to its maintenance and upkeep, she rebuts the presumption that incident to **partition**, plaintiff is entitled to an equal share of the net proceeds upon sale (*Laney v. Siewert,* 26 A.D.3d 194, 194, 810 N.Y.S.2d 436 [2006]). The parties' equitable share of the net proceeds is not amenable to resolution by summary judgment ****156** (*id.*) and instead should be resolved at a hearing before the trial court, where upon the evidence, the trial court can adjust the equities and distribute the proceeds accordingly (*McVicker v. Sarma,* 163 A.D.2d 721, 722, 558 N.Y.S.2d 997 [1990]). For the foregoing reason, plaintiff is also entitled to an accounting (*Tedesco v. Tedesco,* 269 A.D.2d 660, 661, 702 N.Y.S.2d 459 [2000], *lv. dismissed* 95 N.Y.2d 791, 711 N.Y.S.2d 158, 733 N.E.2d 230 [2000]; *Deitz v. Deitz,* 245 A.D.2d 638, 639, 664 N.Y.S.2d 868 [1997]).

[6] Plaintiff failed to demonstrate his ouster from the premises to support his claim for use and occupancy (*see Cohen v. Cohen,* 297 A.D.2d 201, 746 N.Y.S.2d 22 [2002]). We have considered plaintiff's remaining contentions and find them unavailing.

All Citations

74 A.D.3d 667, 905 N.Y.S.2d 153, 2010 N.Y. Slip Op. 05660

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113 A.D.2d 869
Supreme Court, Appellate Division,
Second Department, New York.

MARY GEORGE, D.M.D. AND RALPH EPSTEIN, D.D.S., P.C., Plaintiff-Appellant,
v.
J. WILLIAM BRIDBORD, D.D.S., P.C., Defendant Third-Party Plaintiff-Respondent, Mary George, Individually, et al., etc., Third-Party Defendants-Appellants, et al., Third-Party Defendant.

Sept. 23, 1985.

Synopsis

Counterclaim for **partition** of **leased** office suite was brought in action for specific performance of alleged joint venture agreement to share office space. The Supreme Court, Nassau County, Murphy, J., entered interlocutory judgment granting cross motion for partial summary judgment for **partition**, and appeal was brought. The Supreme Court, Appellate Division, held that: (1) **leased** office suite may be subject of action for **partition**, and (2) there were disputed issues of material fact as to respective **interests**, rights, and share of parties in **leased** office suite, thus precluding summary judgment for **partition**.

Reversed, cross motion denied; remitted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (5)

[1] **Partition** Property and Estates Therein Subject to **Partition**

Leasehold can be **partitioned**. McKinney's RPAPL §§ 901 et seq., 915.

[2] **Partition** Property and Estates Therein Subject to **Partition**

Partition Grounds for Determination

Fact that **leased** property is suite, rather than entire building, does not preclude **partition** of leasehold, but is relevant in determining whether **partition** is practicable or whether sale is required instead. McKinney's RPAPL §§ 901 et seq., 915.

1 Cases that cite this headnote

[3] **Partition** Determination as to Rights of Parties in Property

Court must determine respective **interests**, rights, and share of tenants in leasehold before interlocutory judgment of **partition** may be made. McKinney's RPAPL §§ 907, 915.

3 Cases that cite this headnote

[4] **Partition** Officers, Commissioners, and Referees to Make **Partition** or Sale

Upon court's determination and declaration of respective **interests**, rights, and share of tenants in leasehold, court may appoint commissioners whose only duty is to implement **partition** or sale. McKinney's RPAPL §§ 901 et seq., 907, 915.

2 Cases that cite this headnote

[5] **Judgment** Landlord and Tenant Cases

There were disputed issues of material fact as to tenants' respective **interests**, rights, and share in **leased** office suite, thus precluding summary judgment in action for **partition**. McKinney's RPAPL §§ 901 et seq., 907, 915.

2 Cases that cite this headnote

Attorneys and Law Firms

***869 **795** Gerald J. Barre, Lake Success, for plaintiff-appellant and third-party defendants-appellants.

Hayt, Hayt & Landau, Great Neck (Gary Neil Sazer, Ralph Pernick and Roy Broudny of counsel), for defendant third-party plaintiff-respondent.

Before GIBBONS, J.P., and THOMPSON, WEINSTEIN and LAWRENCE, JJ.

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Opinion

MEMORANDUM BY THE COURT.

In an action, *inter alia,* for specific performance of an alleged joint venture agreement, in which defendant has counterclaimed and interposed a third-party complaint for **partition**, the plaintiff, a professional corporation named Mary George, D.M.D. and Ralph Epstein, D.D.S., P.C., and the third-party defendants Mary George and Ralph Epstein individually, appeal, as limited by their brief, (1) from stated portions of an interlocutory judgment of the Supreme Court, Nassau County, entered October 5, 1984, which, *inter alia,* incorporated the terms of an order dated March 19, 1984, which, *inter alia,* granted defendant's cross motion for partial summary judgment on its fifth cause of action as against appellants for **partition**, and (2) from an order of the same court, entered May 24, 1984, which denied their motion for reargument of the aforementioned cross motion. (Plaintiff and third-party defendants' notice of appeal from the order dated March 19, 1984 is deemed to be a premature notice of appeal from the interlocutory judgment [*see,* CPLR 5520(c)]).

Appeal from the order entered May 24, 1984 dismissed, without costs or disbursements. No appeal lies from the denial of a motion for reargument (*Harper v. Prudential Ins. Co. of Amer.,* 102 A.D.2d 863, 477 N.Y.S.2d 305; *Klatz v. Armor Elevator Co.,* 93 A.D.2d 633, 462 N.Y.S.2d 677).

Interlocutory judgment entered October 5, 1984, reversed insofar as appealed from, without costs or disbursements, defendant's cross motion for partial summary judgment on its fifth cause of action denied, and matter remitted to Special Term for further proceedings pursuant to RPAPL article 9. Order dated March 19, 1984, modified accordingly.

In June 1982, defendant entered into a 10-year **lease** of commercial office space in which defendant's sole shareholder, Dr. J. William Bridbord, was to operate a dental suite. It is alleged that defendant and plaintiff subsequently entered into a joint venture to share the use of this suite and the costs of ***870** constructing and maintaining it. In November 1982, defendant assigned its leasehold **interest** to it and plaintiff as joint tenants of the suite, and the parties entered into a **lease** modification agreement with the landlord owner of the suite, ESR Realty Co.

When the parties were unable to resolve disagreements concerning their respective rights to the use of the suite, plaintiff sued for specific performance of what it alleged was the joint venture agreement. Defendant counterclaimed and instituted a third-party action against the two individual practitioners who are the stockholders of plaintiff and against ESR Realty, the landlord. It demanded **partition** of the **leased** property in its fifth cause of action. Plaintiff moved to disqualify defendant's counsel and defendant cross-moved for partial summary judgment on its fifth cause of action. Appellants, in response to the cross motion, asked the court to dismiss the fifth cause of action pursuant to CPLR 3212(b). In a decision and order entered February 17, 1984, Special Term denied both the motion and cross motion and dismissed the fifth cause of action. The denial of the motion to disqualify defendant's counsel is not in issue on this appeal.

Defendant moved for leave to reargue its cross motion. Special Term granted reargument, and, upon reargument, it reversed its prior decision, and, by order dated March 19, 1984, granted defendant's cross motion for partial summary judgment for **partition** as against appellants. Appellants then brought a motion for reargument, which was denied in an order dated May 24, 1984. An interlocutory judgment appointing ****796** commissioners pursuant to RPAPL 915 was subsequently made and entered. That judgment also directed the commissioners to "determine the right [and] share of each party in the **leased** premise".

Two issues must be resolved on these appeals. First, can defendant receive the relief of **partition** pursuant to RPAPL article 9, when the **interest** involved is a leasehold? Second, if the first answer is affirmative, are there questions of fact sufficient to preclude a grant of partial summary judgment on the cause of action for **partition**.

[1] **[2]** As to the first question, a leasehold can be **partitioned** (RPAPL 901; *Deeb v. Goryeb,* 258 App.Div. 93, 15 N.Y.S.2d 617; *McPhillips v. Fitzgerald,* 76 App.Div. 15, 21, 78 N.Y.S. 631 *affd.* 177 N.Y. 543, 69 N.E.2d 1126; *Walther v. Regnault,* 56 Hun 560, 9 N.Y.S. 840; *see,* 24 N.Y.Jur 2d, Cotenancy and **Partition** § 7). The fact the **leased** property is a suite rather than an entire building is of no relevance except in determining ***871** whether a **partition** is practicable or whether a sale is required instead (RPAPL 915).

[3] **[4]** **[5]** However, there are unresolved factual issues which render premature the grant of an interlocutory judgment of **partition**. While it is established that the parties to these appeals are tenants in common to the property, their disagreements as to their respective **interests**, rights and share

in this property remain unresolved. Before an interlocutory judgment of **partition** may be made, the court itself must determine these rights and declare what they are (RPAPL 907, 915; *Levine v. Goldsmith,* 71 App.Div. 204, 75 N.Y.S. 706; *see, Clark v. Clark,* 55 A.D.2d 985, 390 N.Y.S.2d 685). Only then does the court appoint commissioners whose only duty is to implement a **partition** or sale. The interlocutory judgment herein is accordingly reversed insofar as appealed from and the matter is remitted to Special Term for further proceedings consistent with RPAPL article 9.

All Citations

113 A.D.2d 869, 493 N.Y.S.2d 794

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38 A.D.2d 65
Supreme Court, Appellate Division,
Second Department, New York.

Edward M. RIPP, Appellant,
v.
Josephine RIPP, Respondent.

Dec. 13, 1971.

Synopsis
Divorced husband brought action for partition of former marital home, sole and exclusive possession of which had been awarded to divorced wife. The Supreme Court, Daniel G. Albert, J., 64 Misc.2d 323, 314 N.Y.S.2d 461, granted wife's motion for summary judgment dismissing complaint, and husband appealed. The Supreme Court, Appellate Division, Hopkins, J., held that action was premature where judgment of divorce had not been modified so as to grant husband right of partition.

Order affirmed, with leave to move for modification of judgment of divorce so as to grant right of partition and thereafter to move to open case for permission to serve supplemental complaint to allege such modification.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (8)

[1] **Partition** Homestead

Action by divorced husband for partition of former marital home, sole and exclusive possession of which had been awarded to divorced wife, was premature where judgment of divorce had not been modified so as to grant husband right of partition. Domestic Relations Law § 234; Real Property Actions and Proceedings Law § 901.

27 Cases that cite this headnote

[2] **Partition** Cotenancy or other common interest of parties

Once tenancy by entirety is converted to tenancy in common by divorce of parties, action for partition usually may be brought by either party.

11 Cases that cite this headnote

[3] **Marriage and Cohabitation** Real property in general

Matrimonial relationship between parties at time of acquisition of premises creates "tenancy by the entirety" which is special type of ownership not severable by partition so long as marriage exists.

14 Cases that cite this headnote

[4] **Partition** Adjustment of claims and equities between parties

Though tenant in common has right to maintain action for partition, such remedy is subject to equities between parties. Real Property Actions and Proceedings Law § 901.

21 Cases that cite this headnote

[5] **Partition** Effect of agreements as to partition or of partition by act of parties

Partition will not be compelled in violation of an agreement or a restriction imposed on the estate, albeit the agreement or restriction must be for a reasonable duration.

[6] **Divorce** Methods of Distribution
Divorce Methods of distribution; compensating payments
Divorce Time and order of determinations

Generally, in divorce proceeding, question of sale of marital home or other property of spouses should be decided at time of making of judgment.

3 Cases that cite this headnote

[7] **Divorce** Methods of Distribution

Only if interests of one party in divorce proceeding, or children of marriage, are so predominant, when counterpoised against

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interest of other, that exclusive possession of certain property is virtually compulsory, should court act to continue co-ownership of such property.

2 Cases that cite this headnote

[8] **Divorce** Nature, scope and effect of decision

Disposition, in divorce proceeding, of the marital home, whether in judgment or as result of application for modification of judgment, is reviewable on appeal.

2 Cases that cite this headnote

Attorneys and Law Firms

****466** ***66** Harrison Topkis, Garden City (Samuel Millman, Garden City, of counsel), for appellant.

Hyman Finkelson, New York City, for respondent.

Before RABIN, P.J., and HOPKINS, MUNDER, LATHAM and CHRIST, JJ.

Opinion

****467** HOPKINS, Justice.

The action is for a partition of the former marital home of the parties. The plaintiff and the defendant acquired the home as tenants by the entirety in 1950. In 1970 the defendant was granted a divorce. [1]

By the terms of the judgment dissolving the marriage the defendant was awarded the sole and exclusive possession of the marital home. Within four months after the judgment of divorce this action was commenced. The defendant interposed a defense that the action did not lie in the face of the provision in the judgment giving sole and exclusive possession of the premises to her. She then moved for summary judgment.

[1] The Special Term granted the defendant's motion and dismissed the complaint. In the view of the Special Term, the action for partition was premature until the terms of the judgment of divorce were modified to remove the provision giving the defendant sole possession of the home and to provide for ***67** increased support of the defendant by the plaintiff. [2] We affirm the order of Special Term, with leave to the plaintiff to move for a modification of the judgment of divorce so as to grant to him the right of partition and thereafter to move to open this case and for permission to serve a supplemental complaint to allege such modification of judgment.

[2] We come to this conclusion after a consideration of the traditional principles coalesced in partition and the purpose and policy to be served by the Domestic Relations Law. Once the tenancy by the entirety is converted to a tenancy in common by the divorce of the parties (Stelz v. Shreck, 128 N.Y. 263, 28 N.E. 510), an action for partition usually may be brought by either party (Yax v. Yax, 240 N.Y. 590, 148 N.E. 717; Plancher v. Plancher, 35 A.D.2d 417, 317 N.Y.S.2d 140). It is this doctrine upon which the plaintiff relies in this appeal.

[3] Nonetheless, it is likewise true that the matrimonial relation between the paties at the time of the acquisition of the premises created the tenancy by the entirety—a special type of ownership which could not be severed by partition so long as the marriage existed (Vollaro v. Vollaro, 144 App.Div. 242, 129 N.Y.S. 43). At the point that the marriage was dissolved in this case the court granting the divorce directed that the sole and exclusive possession of the ****468** premises should be awarded to the defendant. This determination was made under the express authority of the statute to (1) 'determine any question as to the title to property arising between the parties' and (2) 'make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties' (Domestic Relations Law, s 234). It is this exercise of power by the court in her behalf upon which the defendant relies to sustain the order of Special Term.

From a purely practical view, it is hardly conceivable that the court granting exclusive possession of the home to the defendant expected that its judgment would be efective only for the span of the four months preceding the commencement of this action, especially since that judgment was made 'having regard to the circumstances of the case and of the respective parties,' in the words of the statute. In the interest of the orderly administration of justice, what one judge in a matrimonial action decides should not be put aside abruptly by the ***68** order of another judge in a second action between the same parties.

The plaintiff's argument to uphold his complaint necessarily rests on the assumption that partition is an absolute right

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of a tenant in common.[3] However, it first should be noted that in this case the tenancy in common was not the original relationship between the parties, but a spin-off of the tenancy by the entirety as a result of the severance of the marital ties. The creation of the tenancy in common was necessarily intertwined with the conditions laid down in the judgment effectig the divorce.

[4] **[5]** Moreover, it is not accurate to say that partition is an absolute right of a tenant in common (cf. 2 Tiffany, The Law of Real Property (3d ed.), s 474). The statute confers on a tenant in common the right to maintain an action for partition (Real Property Actions and Proceedings Law, s 901), but the remedy has always been subject to the equities between the parties.[4] As was said in Moses v. Moses (170 App.Div. 211, 217—218, 155 N.Y.S. 1066, 1071), quoting approvingly from a then contemporary treatise:

'In Freeman on Cotenancy and Partition it is said (section 505): 'When a suit for partition is in a court of equity, or in a court authorized to proceed with powers as ample as those exercised by courts of equity, it may be employed to adjust all the equities existing between the parties and arising out of their relation to the ****469** property to be divided. 'He who seeks equity must do equity.' Hence whoever, by a suit for partition, invokes the jurisdiction of a court of equity in his behalf, thereby submits himself to the same jurisdiction, and concedes its authority to compel him to deal equitably with his co-tenants. As the equities of the co-tenants may arise from a great variety of circumstances, it follows that the assertion of these equities necessarily introduces into partition suits a great variety of issues, and calls for various allegations in the respective complaints and answers which would not be required in an ordinary suit for partition not contemplated by any special equities between the co-tenants.''

***69** Both precedent (Collin v. Seacombe, 277 App.Div. 1141, 101 N.Y.S.2d 259; Grody v. Silverman, 222 App.Div. 526, 226 N.Y.S. 468), even in actions between divorced parties (Sirianni v. Sirianni, 14 A.D.2d 432, 221 N.Y.S.2d 693; Hosford v. Hosford, 273 App.Div. 659, 80 N.Y.S.2d 306), and modern texts (see 4A Powell on Real Property, s 609, pp. 636—637; 2 American Law of Property, s 6.26, p. 117) have recognized that equitable considerations must be taken into account in partition.[5] In the same vein, partition will not be compelled in violation of an agreement or a restriction imposed on the estate (cf. Chew v. Sheldon, 214 N.Y. 344, 348—349, 108 N.E. 552; Nash v. Frank, 9 Misc.2d 103, 166 N.Y.S.2d 846, affd. 6 A.D.2d 687, 174 N.Y.S.2d 953; affd. 6 N.Y.2d 827, 188 N.Y.S.2d 215), albeit the agreement or restriction must be for a reasonable duration (Albin v. Albin, 26 Misc.2d 383, 208 N.Y.S.2d 252, affd. 12 A.D.2d 933, 212 N.Y.S.2d 725; Casolo v. Nardella, 193 Misc. 378, 84 N.Y.S.2d 178, affd. 275 App.Div. 502, 90 N.Y.S.2d 420, mot. lv. to app. dsmd. 300 N.Y. 549, 89 N.E.2d 518).

Thus, in the present action for partition the court would have to consider the provision in the divorce decree granting sole possession of the premises to the defendant and the effect of partition on the circumstances of the parties. In that appraisal the court would be confronted with the fact that the defendant's loss of possession would be coupled in all probability with the need for increased support as a result of conditions in the rental market. The adjustment of these equities, on the other hand, could better be managed by the court in the Matrimonial Part, which so recently had been concerned with these very circumstances in molding the judgment of divorce.

In addition, we think that the Matrimonial Part, dealing solely with problems arising out of marital relations, should decide when and under what terms the marital home should be sold (cf. Pearson v. Pearson, 30 A.D.2d 927, 294 N.Y.S.2d 984.) The Matrimonial Part, in making that decision, should give weight to the relative financial ****470** resources of the parties, the need of either party for occupancy of the home, and the duration of the exclusive possession. For example, the court's decision might well be affected, among other things, by the cost of maintaining the home in comparison to the benefits received, the financial hardship suffered by either party by the refusal to authorize a sale of the property, the presence or absence of children to enjoy the use of the home, or the size and expansiveness of the home in relation to the expected use. The Matrimonial Part in its discretion could determine, once a sale was found to be warranted, the manner of sale, or, if it were so disposed, could permit the institution ***70** of a partition action, so that the supervision of the sale would be undertaken by that part of the court charged with the course of such proceedings.

[6] **[7]** In the usual case, the question of the sale of the marital home or other property of the spouses should be decided at the time of the making of the judgment. At that point in the marital career of the parties all questions at issue are better resolved, so that disputes and irritants do not linger and present further incentives for litigation. Of course, it also must be borne in mind that the right to possession of either party should not be too readily displaced. Only when the interests of one party (or the children of the marriage) are so predominant, when counterpoised against the interests of the

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other, that excusive possession is virtually compulsory should the court act to continue the co-ownership. In most cases the parting of ways should be accomplanied with clearly stated obligations for the future, put in monetary terms so far as possible.

[8] The disposition at the Matrimonial Part of the marital home, whether in the judgment or as a result of an application for a modification of the judgment, is of course reviewable on appeal. In this case the plaintiff should move promptly to modify the judgment of divorce to permit the maintenance of the action for partition.[6] If the Matrimonial Part grants the application, the plaintiff should then move to open this case and for permission to supplement his complaint in this action to allege the modification of the judgment. In the event the plaintiff not move within a reasonable time to modify the judgment, this action of course is at an end.

Hence, two reasons underlie the affirmance of the order of Special Term. First, the concern for the proper and judicious enforcement of the directions in the judgment of divorce, and second, the recognition that equitable factors between the parties who are co-owners of property acquired originally as tenants by the entirety are better ****471** evaluated by the court which determined the matrimonial litigation between the parties.

Accordingly, we affirm the order of Special Term, without costs, and with leave to the plaintiff to move, within a reasonable time, for modification of the judgment of divorce so as to grant him the right to institute an action for partition and ***71** with further leave to the plaintiff, if such right be granted, to move at Special Term, within a reasonable time, to vacate the order and judgment under review and for permission to serve a supplemental complaint in this action.

Order and judgment of the Supreme Court, Nassau County, entered September 30, 1970 and October 19, 1970, respectively, affirmed without costs, and with leave to plaintiff to move, within a reasonable time, for modification of the judgment of divorce so as to grant him the right to institute an action for partition and with further leave to the plaintiff, if such right be granted, to move at Special Term, within a reasonable time, to vacate the order and judgment under review and for permission to serve a supplemental complaint in this action.

SAMUEL RABIN, P.J., and MUNDER, LATHAM and CHRIST, JJ., concur.

All Citations

38 A.D.2d 65, 327 N.Y.S.2d 465

Footnotes

1 The action for a divorce was originally brought by the plaintiff. At the trial the plaintiff withdrew his complaint and the defendant proceeded to prove her counterclaim for a divorce on the ground that the parties had lived apart for a period of two years after a judgment of separation.

2 Though the judgment of divorce provided that the defendant should pay the carrying charges of the property, it also provided that the plaintiff should pay to the defendant for her support and the carrying charges a stipulated weekly amount.

3 Ordinarily, partition is not defeated because the plaintiff is not in actual possession of the premises; constructive possession is sufficient (Brown v. Crossman, 206 N.Y. 471, 100 N.E. 42; 4A Powell on Real Property, s 603, p. 606).

4 Chancery had jurisdiction of an action for partition even without statute (Croghan v. Livingston, 17 N.Y. 218, 220). For a history of the law of New York concerning partition, see Mead v. Mitchell (5 Abb.Prac. 92, affd. 17 N.Y. 210); and 2 Gerard, New York Real Property (6th ed.), s 1434, pp. 2096—2098).

5 In other jurisdictions, see, e.g., Hipp v. Hipp (111 U.S.App.D.C. 307, 296 F.2d 429); Jezo v. Jezo (23 Wis.2d 399, 127 N.W.2d 246, 129 N.W.2d 195); Wiegand v. Wiegand (410 Ill. 533, 103 N.E.2d 137).

6 We do not mean to say that the plaintiff may not choose to request the Matrimonial Part to direct a sale of the property, or that the Matrimonial Part may not decide to direct a sale, even though the plaintiff moves

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to be allowed to maintain a partition action. The course taken by the Matrimonial Part, as we have already indicated, lies within its discretion in the light of all the circumstances.

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112 A.D.2d 209
Supreme Court, Appellate Division,
Second Department, New York.

Alan ROKEACH, Respondent,
v.
Helene ZALTZ, etc., Appellant, et al., Defendants.

July 8, 1985.

Synopsis

In an **action** for **partition** and for accounting of rents and other moneys, an order of the Supreme Court, Kings County, Rader, J., denied that branch of defendant's motion which was to dismiss complaint, and directed the filing of note of issue. On appeal by the defendant, the Supreme Court, Appellate Division, held that: (1) principle that **partition action** by one or more cotenants is unaffected by any limitations period for as long as cotenancy survives was applicable to accounting **action** accompanying request for **partition**; (2) where branch of motion was to dismiss for failure to state cause of **action**, and not in nature of application for summary judgment, and was not treated as application for summary judgment, it was not necessary that complaint allegations, to establish prima facie case, be fully substantiated at such point in the proceedings; and (3) if there was deed of subject property to another party in 1940, same did not conclusively establish, for purposes of plaintiff's right to bring **action** for **partition**, that plaintiff's grandfather had no partnership interest in the property when he attempted to devise it to plaintiff and his cotenants in 1949.

Order modified and, as modified, affirmed insofar as appealed from.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Summary Judgment; Motion to Dismiss for Failure to State a Claim.

West Headnotes (6)

[1] **Partition** Right to and Grounds for **Partition** in General

As alleged tenant in common of property, plaintiff could maintain **action** for **partition**. McKinney's RPAPL § 901.

[2] **Partition** Time to Sue, Limitations, and Laches

Partition action by one or more cotenants is unaffected by any limitations period for as long as cotenancy survives, since cause is continuing one so long as cotenancy exists. McKinney's RPAPL § 901.

1 Cases that cite this headnote

[3] **Partition** Time to Sue, Limitations, and Laches

Principle that **partition action** by one or more cotenants is unaffected by any limitations period for as long as cotenancy survives applied to accounting **action** accompanying request of cotenant for **partition**, and limitations defense was not available. McKinney's RPAPL § 901.

1 Cases that cite this headnote

[4] **Partition** Allegations as to Parties, Title, Interests, and Possession

Complaint of alleged cotenant set forth adequate facts to give rise to issue concerning ownership of the property and complaint on its face was sufficient to establish prima facie case for **partition** and an accounting. McKinney's RPAPL § 901.

[5] **Pretrial Procedure** Sufficiency and Effect

Where branch of motion was to dismiss for failure to state cause of **action**, and not in nature of application for summary judgment, and was not treated as application for summary judgment, it was not necessary that complaint allegations, to establish prima facie case, be fully substantiated at such point in the proceedings. McKinney's CPLR 3211(a), par. 7, (c), 3212.

1 Cases that cite this headnote

[6] **Partition** Determination in **Action** for **Partition**

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Even if there was deed of subject property to another party in 1940, that did not conclusively establish, for purposes of plaintiff's right to bring **action** for **partition**, that plaintiff's grandfather had no partnership interest in the property when he attempted to devise it to plaintiff and his cotenants in 1949, in view of fact that plaintiff demonstrated that records or documents of a post–1940 conveyance of realty to his grandfather might exist, and any dismissal of the complaint would be thus premature, no opportunity to conduct further discovery having yet been granted.

1 Cases that cite this headnote

Attorneys and Law Firms

***209** ****429** Samuel M. Krieger, New York City (Sharon M. Zughaft, New York City, on the brief), for appellant.

Deutsch & Spring, New York City (Austin D. Massoni of counsel), for respondent.

Before MANGANO, J.P., and THOMPSON, BROWN and KUNZEMAN, JJ.

Opinion

MEMORANDUM BY THE COURT.

In an **action** for a **partition** of certain real property and for an accounting of rents and other moneys received or collected from the property, defendant Helene Zaltz, as administratrix of the estate of Max Rokeach, appeals as limited by her brief, from so much of an order of the Supreme Court, Kings County, dated July 31, 1984, as denied that branch of her motion which was to dismiss the complaint and directed the filing of a note of issue within 60 days.

Order modified, by deleting therefrom the third decretal paragraph which ordered ****430** the filing of a note of issue within 60 days, and substituting therefor a provision that the parties, if they be so advised, may conduct further discovery. As so modified, order affirmed insofar as appealed from, without costs or disbursements.

[1] **[2]** **[3]** Appellant's contention that the instant **action** for a **partition** and accounting is barred by the Statute of Limitations is without merit. As an alleged tenant in common of the property, plaintiff may maintain an **action** for **partition** (*see,* RPAPL 901; *Willis v. Sterling,* 224 App.Div. 647, 232 N.Y.S. 143, *appeal dismissed* 253 N.Y. 600, 171 N.E. 800). It is well settled that such an **action** by one or more cotenants is unaffected by any limitations period for as long as the cotenancy survives (*see, Rosen v. Rosen,* 78 A.D.2d 911, 432 N.Y.S.2d 921). This is because "[t]he cause of **action** [for **partition**] is a continuing one so long as the cotenancy exists" (*Dresser v. Travis,* 39 Misc. 358, 364, 79 N.Y.S. 924, *affd.* 87 App.Div. 632, 84 N.Y.S. 1124, *affd.* 177 N.Y. 376, 69 N.E. 736). Moreover, there is strong support for the proposition that the same rules apply to an accounting **action** which accompanies the request for a **partition** (*see, Goergen v. Maar,* 2 A.D.2d 276, 153 N.Y.S.2d 826). Since there is no claim by appellant that the purported tenancy in common has been dissolved, the Statute of Limitations defense must fail.

[4] **[5]** Likewise, we are unpersuaded by appellant's contention that a dismissal is warranted under CPLR 3211(a)(7) because the complaint fails to state a cause of **action**. Plaintiff has alleged adequate facts to give rise to an issue concerning the ownership of the property and the complaint on its face is sufficient to establish a prima facie case for **partition** and an accounting. These allegations need not be fully substantiated ***210** by plaintiff at this point, for the branch of appellant's motion which was to dismiss for failure to state a cause of **action** is not in the nature of a CPLR 3212 application for summary judgment, nor did Special Term treat it as such (*see,* CPLR 3211 [c]).

[6] Moreover, we do not agree with appellant's contention that a deed of the subject property to another party in 1940 conclusively establishes that plaintiff's grandfather had no ownership interest in the property when he attempted to devise it to plaintiff and his cotenants in 1949. Plaintiff has demonstrated that records or documents of a post-1940 conveyance of the realty to his grandfather may exist. Thus, any dismissal of the complaint would be premature, as the parties should be given the opportunity to conduct further discovery. Therefore, while Special Term properly denied that branch of the motion which was to dismiss, the court erred in ordering that a note of issue be filed within 60 days. We modify the order of Special Term accordingly.

All Citations

112 A.D.2d 209, 491 N.Y.S.2d 428

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77 A.D.3d 914
Supreme Court, Appellate Division,
Second Department, New York.

Mark TURRISI, appellant,
v.
Donna SEVERINO, respondent, et al., defendants.

Oct. 26, 2010.

Synopsis

Background: In **action** for **partition** and sale of real property, the Supreme Court, Suffolk County, Sweeney, J., entered order directing that net proceeds of sale of subject property be divided equally after payment to defendant, and denying plaintiff's request for credit for payments of carrying charges, repairs, and improvements of property. Plaintiff filed interlocutory appeal.

[Holding:] The Supreme Court, Appellate Division, held that enforcement of parties' prior agreement regarding division of net proceeds of sale was proper.

Affirmed.

West Headnotes (4)

[1] **Partition** Form of remedy

Partition Adjustment of claims and equities between parties

Although statutory, **partition** **action** is equitable in nature, and court may compel parties to do equity between themselves when adjusting distribution of proceeds of sale.

[2] **Partition** Effect of agreements as to **partition** or of **partition** by act of parties

In determining equities between parties in **partition** **action**, agreements between cotenants should be given effect.

[3] **Partition** Reimbursement of payments and advances

Voluntary payments made by one cotenant, with no expectation of reimbursement, generally are not refundable upon **partition**.

[4] **Partition** Effect of agreements as to **partition** or of **partition** by act of parties

Partition Adjustment of claims and equities between parties

Enforcement of agreement to equally divide net proceeds of sale after payment of $27,000 to one co-tenant, without awarding other co-tenant credit for payments of carrying charges, repairs, and improvements of subject property, was warranted in **partition** **action**, absent allegation of any facts requiring further adjustments based upon principles of equity.

Attorneys and Law Firms

****505** Rayano & Garabedian, P.C., Central Islip, N.Y. (Michael Garabedian and Richard Martin Santos of counsel), for appellant.

Lewis H. Lehrman, Mineola, N.Y., for respondent.

A. GAIL PRUDENTI, P.J., DANIEL D. ANGIOLILLO, ARIEL E. BELEN, and SANDRA L. SGROI, JJ.

Opinion

***914** In an **action**, inter alia, for the **partition** and sale of real property, the plaintiff appeals, as limited by his brief, from so much of an interlocutory judgment of the Supreme Court, Suffolk County (Sweeney, J.), dated January 14, 2010, as, upon directing the **partition** and sale of the subject property, directed that the net proceeds of the sale be divided equally after the payment of $27,000 to the defendant, and failed to award the plaintiff a credit for payments of carrying charges, repairs, and improvements of the subject property.

ORDERED that the interlocutory judgment is affirmed insofar as appealed from, with costs.

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The parties, who were never married, purchased the subject property in 2001 as tenants in common. The parties signed a written agreement dated June 14, 2001, wherein they agreed that, upon the sale or disposition of the subject property, they "shall be entitled to share the equity equally after payment" of the sum of $27,000 to the defendant. The plaintiff does not dispute that the parties orally agreed that he would be responsible for household expenses in excess of $300 per month, including the mortgage, real estate taxes, and insurance.

The interlocutory judgment appealed from directed the **partition** and sale of the subject property, and directed that, after payment to the defendant of the sum of $27,000, pursuant to the parties' written agreement, the remaining proceeds "shall be divided equally" without crediting the plaintiff for payments made in excess of his one-half interest in the property.

[1] **[2]** **[3]** Although statutory, a **partition** **action** is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale (*see Cook v. Petito,* 208 A.D.2d 886, 619 N.Y.S.2d 571; *Oliva v. Oliva,* 136 A.D.2d 611, 612, 523 N.Y.S.2d 859). In determining the equities between the parties, agreements between the cotenants should be given effect (*see Oliva v. Oliva,* 136 A.D.2d 611, 523 N.Y.S.2d 859). Further, voluntary payments made by one cotenant, with no expectation of ***915** reimbursement, generally are not refundable upon **partition** (*see Hufnagel v. Bruns,* 152 A.D.2d 459, 461, 542 N.Y.S.2d 652).

[4] The division of the proceeds as directed by the Supreme Court is in accordance with the parties' agreements. The plaintiff failed to allege any facts which would require further adjustments based upon principles of equity (*see Cook v. Petito,* 208 A.D.2d 886, 619 N.Y.S.2d 571; *Hufnagel v. Bruns,* 152 A.D.2d 459, 461, 542 N.Y.S.2d 652).

The plaintiff's remaining contentions are without merit, or not properly before this Court.

All Citations

77 A.D.3d 914, 910 N.Y.S.2d 504, 2010 N.Y. Slip Op. 07740

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23 Misc.2d 402
Supreme Court, Cattaraugus County, New York, Trial Term.

David WATTERS, George Watters, Lena Quinn, Rebecca Gough and Rena A. Walker, Plaintiffs,
v.
PEOPLE of the State of New York, Defendant.

Jan. 21, 1960.

Synopsis

Proceeding by persons holding one half of oil, gas and mineral rights in two adjoining lots in state park, against state holding other one-half interest as a tenant in common with them, for **partition**. The Supreme Court, Hamilton Ward, J., held, inter alia, that **partition** would be granted and that as there was evidence that land contained transitory oil and gas subject to underdraining, **partition** of rights would be made by drawing line diagonally from northeast corner of one lot to southwest corner of other, setting aside to plaintiffs interest on one side of line and to state interest on other, as such a division would protect state as much as possible from loss by underdraining and as state was not permitted to join in common effort to bring resources to surface.

Judgment accordingly.

West Headnotes (7)

[1] **Partition** Property and Estates Therein Subject to **Partition**

Oil, gas and other minerals were interests in real property and partitionable. Civil Practice Act, §§ 1012 et seq., 1026.

1 Cases that cite this headnote

[2] **Mines and Minerals** Nature of Estate Granted or Reserved

Bank's conveyance to state of two lots by deed reserving to heirs of bank's grantors one half of all oil, gas and minerals, and the rights thereto granted to state surface of lots and undivided one-half interest in oil, gas and minerals, and state and original grantor's heirs were tenants in common in oil, gas and mineral rights. Civil Practice Act, §§ 1012 et seq., 1020.

[3] **States** Property Interests in General

State's waiver of sovereign immunity from suit contained in Court of Claims Act includes actions for **partition**. Civil Practice Act, §§ 1012 et seq., 1020; Court of Claims Act, § 8.

[4] **States** Judgment and Relief

In proceeding against state wherein plaintiffs who were cotenants with state in oil, gas and mineral rights sought **partition**, as state had no authority to join with private persons in leasing mineral interests, court could not adopt plan which would allow plaintiffs right to lease property subject to right of state to receive its share of proceeds or decree sale of rights to person offering highest royalty to owners, as court would be allowing state to do by indirection that which it could not do by direction.

[5] **Action** Nature of Action

Proceeding for **partition** was action in equity. Civil Practice Act, §§ 1012 et seq., 1026.

[6] **States** Judgment and Relief

In proceeding against state wherein plaintiffs who were cotenants with state in oil, gas and mineral rights under land sought **partition**, as state could not join with plaintiffs in common effort to bring resources to surface and there divide them, either in kind or by division of profits, and as sale of whole was not feasible, court would decree **partition** of interests. Civil Practice Act, §§ 1012 et seq., 1020, 1026.

[7] **States** Judgment and Relief

In proceeding by tenants in common holding one half of oil, gas and mineral rights in two adjoining lots in state park, against state holding other one-half interest as a tenant in common

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with them, for **partition**, wherein there was evidence that land contained transitory oil and gas subject to underdraining, **partition** of rights would be made by drawing line diagonally from northeast corner of one lot to southwest corner of other, setting aside to plaintiffs interest on one side of line and to state interest on other, as such a division would protect state as much as possible from loss by underdraining and as state was not permitted to join in common effort to bring resources to surface. Civil Practice Act, §§ 1012 et seq., 1020.

Attorneys and Law Firms

****787 *403** Congdon, Congdon & Perheault, Salamanca, for plaintiffs.

Louis J. Lefkowitz, Atty. Gen. (Matthew A. Tiffany, Edward R. Amend and Emil Woldar, Asst. Attys. Gen., of counsel), for defendant.

Opinion

HAMILTON WARD, Justice.

This is an action for the **partition** of oil, gas and minerals and the rights thereto in accordance with the provisions of Article 64 of the Civil Practice Act. The plaintiffs do not seek **partition** as among themselves but between themselves jointly and the State of New York (§ 1026, Civil Practice Act). **[1]** The subject of this **partition** action is novel but not unknown to the law of this state and other states where oil and gas are commercially produced. For the reasons and upon the law appearing below, I find that the oil, gas and other minerals and the rights thereto are an interest in real property and partitionable. ***404** Canfield and Chapman v. Ford, 1857, 28 Barb. 336; Shepard v. McCalmont Oil Co., 38 Hun 37;Shepard v. McCalmont Oil Co., 38 Hun 37; Op.Atty.Gen., 1948, at page 194; Op.Atty.Gen., 1933, at page 371; First National Bank of Richberg v. Dow, 41 Hun 13,First National Bank of Richberg v. Dow, 41 Hun 13, 2 N.Y.St.Rep. 170;2 N.Y.St.Rep. 170; Marvin v. Brewster Iron **Mining** Co., 55 N.Y. 538, at page 548; Ryckman v. Gillis, 1847, 57 N.Y. 68; Thompson on Real Property, § 5319 in Replacement Volume 10a and § 5563 in Old Volume 10 [1940 ed.]; Wolfe v. Stanford, 1937, 179 Okl. 27, 64 P.2d 335; Holland v. Shaffer, 1947, 162 Kan. 474, 178 P.2d 235, 173 A.L.R. 845; Sadler v. Public Nat. Bank & Trust Co., 10 Cir., 172 F.2d 870; Collier v. Collier, 1938, 184 Okl. 38, 84 P.2d 603 and Wight v. Ingram-Day Lumber Co., 1944, 195 Miss. 823, 17 So.2d 196. **Partition** will be directed even where surface owner owns part of the mineral interest. Uphoff v. Trustees Tufts College, 1952, 351 Ill. 146, 184 N.E. 213, 93 A.L.R. 1224; Wight v. Ingram-Day Lumber Co., 1944, 195 Miss. 823, 17 So.2d 196 and Chaffin v. Hall, Tex.Civ.App.1948, 210 S.W.2d 191.

Prior to 1926, one Frank W. Burton and one David Watters owned in fee and as tenants in common two adjoining lots briefly described as Lots Nos. 58 and 70, Town 1, Range 6 of the Holland Land Company's survey, containing 363 acres and 348 acres more or less respectively, or a total of 711 acres more or less. David Watters and his wife, Catherine, died intestate prior to February 26, 1926. On that date Frank W. Burton and his wife Martha and all the heirs at law of David Watters and his wife Catherine conveyed the lands above described to the Salamanca Trust Company of Salamanca, New York. This conveyance contained the following reservation: ‘Excepting and reserving (to the heirs above named of David and Catherine Watters, deceased) from the lands above ****788** described one-half of all the oil, gas and other minerals in, under and upon the lands described, together with free ingress and egress to operate therefor in the same manner as is usual and necessary in connection with producing and operating for oil, gas and other minerals.’

I find that the plaintiffs herein are the sole heirs of David Watters and Catherine Watters.

On the 20th day of May 1926, the Salamanca Trust Company duly conveyed to the State of New York the above described premises by a deed containing the following exception: ‘Excepting and reserving to George Watters, Frank Watters, William Watters and Rebecca Tripp, being the heirs of David and Catherine Watters, deceased, from the lands above described, one-half of all the oil, gas and other minerals in, under and upon the above described lands, together with one-half of all the oil, gas and mineral rights, together with free ingress and egress to operate therefor in the same manner as is usual and necessary in connection with producing and operating for oil, gas and other minerals.’

[2] ***405** By this last conveyance, and I so find, defendant became the owner of the surface of Lots 58 and 70 and an undivided one-half interest in the oil, gas and other minerals in, under and upon such land, and the plaintiffs by inheritance

from the heirs of David Watters and Catherine Watters are now the owners of an undivided one-half interest in the oil, gas and other minerals in, under and upon the premises devised, and the rights thereto, together with the usual and ordinary ingress and egress to harvest these rights. The parties hereto are tenants in common in the oil, gas and other minerals in, under and upon Lots Nos. 58 and 70. The oil, gas and other minerals and rights thereto are interests in real property as defined by § 1012 of the Civil Practice Act and are subject to **partition** as provided for by Article 64 of the Civil Practice Act (cases cited above).

[3] If the defendant, State of New York, was a natural person or a foreign or domestic private corporation, no real problem would arise in the judgment to follow. By Article II, § 8 of the Court of Claims Act, the State of New York has waived its sovereign immunity. In the view of this court, such waiver includes actions for **partition** (§ 1020, C.P.A.). However, several practical problems call for the closest scrutiny and exercise of ingenuity by this court of equity to arrive at an equitable determination.

The lands here involved lie within the Allegany State Park, a large wooded area in the southwestern part of the State of New York set aside and dedicated to the use of all of the people of this and other states for recreation. This court has happy recollections of hunting snowshoe rabbits as a boy with his late father, Hamilton Ward, one of the originators of the Allegany State Park in the area herein involved. Lots 58 and 70 are in a remote and little used portion of the park. ****789** Properly conducted drilling operations in this area will detract little from the aesthetic use of the park by the public for park purposes. Drilling operations are now going on within the park on nearby areas by persons who reserved to themselves or others reserved to them the gas, oil and mineral rights in those areas when the surface of the land was conveyed to the State of New York (Lot No. 22, p. 94 T.R.).

[4] The real problem here is how to permit the plaintiffs to realize the benefits reserved to them in the reservation by their ancestors without depriving the State of its rights in the undivided one-half interest in the oil, gas and other mineral rights in and upon these lands. The State is in a different position than a natural person or a private corporation. For reasons satisfactory to the State, it does not choose to explore for and ***406** remove oil, gas and other minerals it owns below the surface of lands owned by the State and used for park purposes. In 1944 legislation was passed by the Legislature of this State which would permit the State, upon the recommendation of the Conservation Commissioner and approval of the Allegany State Park Commission, to enter into leases with private operators to develop oil and gas within Allegany State Park but the then governor of the State vetoed the legislation (Senate Print No. 2100). For this reason, the State cannot join with the plaintiffs or others in leases with private operators which would bring these oils, gases and other minerals to the surface, there to be divided in kind or for a division of the net proceeds.

This court does not view with favor the suggestion made by the defendant in its memorandum (p. 5): 'For example, the Court could decree a sale of the right to enter, drill and operate, the bid to go to the person offering the highest royalty to the owners; or else the Court could declare the right of the plaintiffs to make a lease of the entire right of entry, subject to the State's right to receive half of the owners' legitimate proceeds under such an arrangement.' In effect, this proposal is a leasing and as above, the State cannot participate in a lease of mineral rights in park lands. This court should not, by its judgment, direct the defendant to do by indirection that which it cannot do directly. Because of this, the State may be depriving itself of vast sums of money. Allegany State Park lies just across the state line from the famous Bradford oil fields and but a few miles from the Drake well.

[5] Some way must be found to bring about equity between the parties. This is an action in equity (Grody v. Silverman, 4th Dept., 222 App.Div. 526, 226 N.Y.S. 468).

Upon the trial it appeared by expert testimony that oil and gas below the surface is transitory; that by a phenomenon referred to as 'underdraining', to some extent oil, and to larger extent gas, will move in the direction of a vent caused by drilling into the oil bearing sands below the surface of the earth. Thus, gas and oil will leave its resting place ****790** under the lands of one and be removed through the aperture drilled on the land of his neighbor. This is a usual and expected thing in free, competitive development of oil and gas fields, but the State either cannot or will not compete and cannot join with the plaintiffs in a mutual endeavor to capture the mineral resources below the surface of these lots. This puts the State in a 'dog in the manger' posture and unless the plaintiffs find relief through the equitable powers of this court, they will lose the fruits of the ***407** reservation to them by their common ancestors and the defendant is unjustly enriched thereby.

Partition is the only remedy available to the plaintiffs. If **partition** is undesirable to the defendant State, it can exercise

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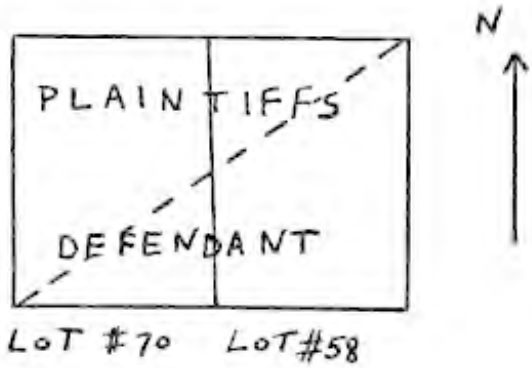
its power of eminent domain. The defendant is now depriving the plaintiffs of their property without just compensation.

It may not be of any real importance but it must not be forgotten that the conveyance from Burton and heirs of David Watters ran to a domestic banking corporation, the Salamanca Trust Company, and not to the State of New York and that the State of New York took its title in turn from the Salamanca Trust Company subject to the above reservation. For this reason, it cannot be said that the heirs of Frank Watters, when they conveyed to the bank, knew or should have known that the reservation of the undivided one-half interest in the oil, gas and other mineral rights might be denied them or their heirs by the inability or unwillingness of the subsequent grantee, the State of New York, to yield up the share of these rights reserved to the heirs of David Watters.

[6] **[7]** Because the defendant State of New York cannot join with the plaintiffs in a common effort to bring these resources to the surface and there divide them, either in kind or by the division of profits, it is necessary to **partition** the oil, gas and other minerals and the rights thereto in place below the surface and set over to the plaintiffs one-half the oil, gas and other minerals and the rights thereto below the surface of Lots 58 and 70, and set over to the defendant the remaining one-half interest also in place below the surface. A sale of the whole is not feasible and is impracticable (Wight v. Ingram-Day Lumber Co., supra).

Several proposals for **partition** have been submitted by the plaintiffs. None of these is equitable, for all the plans submitted would permit a gross underdraining of the lots involved to the detriment of the defendant. There is no evidence before this court indicating where oil or gas or both may be found in larger or smaller quantities, it at all, in either lot or portion of either lot. For this reason, it seems to me if we consider that Lot 70 lies to the west of Lot 58, then starting at a point in the northeast corner of Lot 58, a line is drawn to the southwest corner of Lot 70, the area of the two lots will be divided nearly equally.

The interlocutory judgment to follow will set over to the plaintiffs absolutely, the gas, oil and other minerals brought to the surface by usual ****791** operations for such purposes in the area ***408** selected by the court and represented in the drawing below, and set over to the defendant absolute, the gas, oil and other minerals in the area indicated below.



By verbal description, the sub-surface area set over to the plaintiffs begins at a point in the northeast corner of Lot 58; running thence westerly to the northwest corner of Lot 70; thence southerly to the southwest corner of lot 70; thence diagonally and northeasterly to the point of beginning. Such a division will protect the defendant State of New York as much as possible from loss of its oil, gas and other minerals and the rights thereto, by underdraining and at the same time deliver over to the plaintiffs enjoyment of the above reservation made on their behalf. This division will permit an easily ascertainable boundary between the **partitioned** sub-surface premised and reserve to the defendant State of New York all the unobstructed use of nearly one-half of the surface area of the two lots and, of course, the State retains for its uses, the surface of the other one-half of Lots 58 and 70 not actually occupied by drilling operations and attendant uses by the plaintiffs.

The judgment to follow shall provide inter alia, that the plaintiffs shall cause to be made a proper survey of the area set over to them with suitable monuments defining the boundaries.

Unless within ten days of receipt of this decision either party submits requests to find pursuant to § 439 of the Civil Practice Act, this decision contains the facts deemed essential by the court.

The motion of the plaintiffs for judgment is granted; the motion of the defendant for judgment is denied. All other motions made by the defendant upon which the court has reserved are also denied.

Settle judgment.

All Citations

23 Misc.2d 402, 195 N.Y.S.2d 785

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McKinney's RPAPL § 901

§ 901. By whom maintainable

Currentness

1. A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.

2. A person holding a future estate as defined in sections forty, forty-a or forty-b of the real property law [1] or a reversion as joint tenant or tenant in common may maintain an action for the partition of the real property to which it attaches, according to his respective share, subject to the interest of the person holding the particular estate, but no sale of the premises in such an action shall be made except with the consent in writing, to be acknowledged or proved and certified in like manner as a deed to be recorded, of the person owning and holding such particular estate. If partition or sale cannot be made without great prejudice to the owners, the complaint shall be dismissed; dismissal shall not affect the right of any party to bring a new action after the determination of such particular estate.

3. A person entitled as a joint tenant or a tenant in common by reason of his being an heir of a person who died holding and in possession of real property, may maintain an action for partition, whether he is in or out of possession, notwithstanding an apparent devise to another by the decedent, and possession under such a devise. The plaintiff shall establish that the apparent devise is void.

4. In the event the estate of a decedent is the owner of an estate in common in real property, the executor or administrator may bring a partition action or intervene in a pending partition action on behalf of the estate if, upon application duly made, the surrogate approves.

Credits
(Added L.1962, c. 312, § 23. Amended L.1965, c. 204, § 15; L.1975, c. 283, § 2.)

Footnotes

1 Repealed. EPTL 14-1.1, eff. Sept. 1, 1967. See EPTL 6-4.7 to 6-4.9.

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McKinney's RPAPL § 903

§ 903. Necessary defendants

Currentness

Each of the following persons shall be made a party to the action:

1. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy or for years;

2. Every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein;

3. Every person who, by any contingency, is or may become entitled to a beneficial interest in an undivided share in the property, provided that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such event had happened immediately before the commencement of the action;

4. Every person having an inchoate right of dower in an undivided share in the property;

5. Every person having a right of dower in the property, or any part thereof, which has not been admeasured; and

6. An executor or administrator, where letters testamentary or of administration have been issued on the estate of the decedent from whom the plaintiff's title to the real property is derived, and the action is brought within eighteen months after such letters were issued; or where the person of whose estate the executor or administrator has been appointed should, if living, be a party to the action. If no executor or administrator has been appointed for the estate of such a person, that fact must be stated in the complaint.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 904

§ 904. Permissible defendants

Currentness

The plaintiff, at his election, may make defendant in the action:

1. A tenant by the curtesy or for life or for years, of the entire property, or whoever may be entitled to a contingent or vested remainder or reversion in the entire property, or a person having a lien or interest which attaches to the entire property. A person specified in this subdivision who is not made a party is not affected by the judgment in the action.

2. A person having a lien on an undivided share or interest in the property. The nature of the lien and the share or interest to which it attaches shall be specified.

3. An unknown person entitled to an estate or interest in the property sold. The court shall provide for the protection of his rights, as far as may be, as if he were known and had appeared.

4. The state.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 905

§ 905. Complaint

Currentness

The complaint shall describe the property with reasonable certainty, specify the rights, shares and interests therein of each of the parties, as far as the same are known to the plaintiff, and contain any other allegation required by statute. If a party, or the share, right or interest of a party, be unknown to the plaintiff; or if a share, right or interest be uncertain or contingent; or if the ownership of the inheritance depend upon an executory devise; or if a remainder be contingent, so that the party cannot be named; such facts shall be stated in the complaint. The complaint shall state whether the parties own any other lands in common.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 907

§ 907. Trial of title or interest

Currentness

1. The title or interest of any party in the property may be put in issue. When any defendant, not a tenant in common or joint tenant with plaintiff, puts in issue title or interest, all subsequent proceedings as to such defendant, including the trial, judgment and execution, shall be the same as if it were an action to recover real property.

2. An issue of fact joined in the action is triable by a jury.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 911

§ 911. Ascertainment of rights of parties before interlocutory judgment on default or admission or where party is an infant, absentee or unknown defendant

Currentness

If a defendant has made default in appearing or pleading, or the rights of the parties are not controverted, or a party be an infant, absentee or unknown, the court shall ascertain the rights, shares and interests of the several parties in the property, by a reference or otherwise, before interlocutory judgment is rendered.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 913

§ 913. Inquiry as to creditors

Currentness

1. Before an interlocutory judgment for the sale of real property is rendered the court shall ascertain, by reference or otherwise, whether there is any creditor not a party who has a lien on the undivided share or interest of any party. A search certified by the clerk or by the clerk and register of the county where the property is situated that there is no such outstanding lien is sufficient proof of the absence of such creditor.

2. Where a reference is directed, the referee shall cause a notice to be published once in each week for four successive weeks in such newspaper published in the county wherein the place of trial is designated as shall be designated by the court directing said reference, and also, where the court so directs, in a newspaper published in each county wherein the property is situated, requiring each person not a party to the action who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee at a specified place and on or before a specified day to prove his lien and the true amount due or to become due to him by reason thereof. The referee shall report to the court with all convenient speed the name of each creditor whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof and the amount due or to become due thereupon.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 915

§ 915. Interlocutory judgment

Currentness

The interlocutory judgment shall determine the right, share or interest of each party in the property, as far as the same has been ascertained. Where the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, shall direct that the property or the part so circumstanced be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff shall direct that partition be made between the parties according to their respective rights, shares and interests and shall designate three reputable and disinterested freeholders as commissioners to make the partition so directed.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 915, NY RP ACT & PRO § 915
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McKinney's RPAPL § 916

§ 916. Interlocutory judgment directing partial partition

Currentness

Where the right, share and interest of a party has been ascertained, and the rights, shares or interests of the other parties as between themselves remain unascertained, an interlocutory judgment for a partition shall direct a partition as between the party whose share has been so determined and the other parties to the action. Where the rights, shares and interests of two or more parties have been thus ascertained and determined, the interlocutory judgment may also direct the partition among them of a part of the property proportionate to their aggregate shares. In either case, the court, from time to time, as the other rights, shares and interests are ascertained, may render an interlocutory judgment directing the partition, in like manner, of the remainder of the property. Where an interlocutory judgment is rendered in a case specified in this section, the court may direct the action to be severed, and final judgment to be rendered with respect to the portion of the property set apart to the parties whose rights, shares and interests are determined, leaving the action to proceed as against the other parties with respect to the remainder of the property; and if necessary, the court may direct that one of those parties be substituted as plaintiff.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 916, NY RP ACT & PRO § 916
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McKinney's RPAPL § 917

§ 917. Interlocutory judgment directing partition in common

Currentness

Where two or more parties desire to enjoy their shares in common with each other, the interlocutory judgment may direct partition to be so made as to set off to them their shares of the real property partitioned, without partition as between themselves, to be held by them in common.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 917, NY RP ACT & PRO § 917
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McKinney's RPAPL § 918

§ 918. Interlocutory judgment directing sale or exception of lien or dower interest

Currentness

1. An interlocutory judgment directing the sale of the property may direct that the premises sold shall be free from the lien of every debt of a decedent, from whom the plaintiff's title is derived, or of a decedent who, if living, should be a party to the action, except debts which were a lien upon the premises before the death of such decedent.

2. Where a party has an existing right of dower in the entire property directed to be sold, at the time when an interlocutory judgment for a sale is rendered in an action for partition, the court shall determine whether the interests of all the parties require that the right of dower should be excepted from the sale or that it should be sold. If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 918, NY RP ACT & PRO § 918
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's RPAPL § 919

§ 919. Interlocutory judgment directing credit on sale

Currentness

The court, in the interlocutory judgment for a sale, shall direct the terms of credit which may be allowed for any portion of the purchase-money.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 919, NY RP ACT & PRO § 919
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McKinney's RPAPL § 921

§ 921. Actual partition

Currentness

1. The commissioners designated by the interlocutory judgment shall forthwith proceed to make partition as directed by such judgment, unless it appears to them that partition thereof, or of a particular lot, tract or other portion thereof, cannot be made without great prejudice to the owners; in which case, they shall make a written report of that fact to the court.

2. The commissioners shall divide the property into distinct parcels and allot the several parcels to the respective parties, quality and quantity being relatively considered, according to the respective rights and interests of the parties as fixed by the interlocutory judgment. They shall designate the several parcels by suitable monuments. They may employ a surveyor, with the necessary assistants, to aid them.

3. Where a party has a right of dower in the property, or a part thereof, which has not been admeasured, or has an estate by the curtesy or for life or for years in an undivided share of the property, the commissioners may allot to that party his share without reference to the duration of the estate. They may make partition of the share so allotted to that party, among the parties who are entitled to the remainder or reversion thereof, to be enjoyed by them upon the determination of the particular estate, where, in the opinion of the commissioners, such a partition can be made without prejudice to the rights of the parties.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 921, NY RP ACT & PRO § 921
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McKinney's RPAPL § 922

§ 922. Meeting of commissioners; report of actual partition; confirming or setting aside report

Currentness

1. All the commissioners shall meet together in the performance of any of their duties, but the acts of a majority so met are valid. They shall make a full report of their proceedings, under their hands, specifying therein the manner in which they have discharged their trust, describing the property divided and the share or interest in a share allotted to each party, with the quantity, courses and distances or other particular description of each share, and a description of the monuments; and specifying the items of their charges. Their report shall be acknowledged or proved, and certified, in like manner as a deed to be recorded, and shall be filed in the office of the clerk.

2. The court shall confirm or set aside the report, and, if necessary, may appoint new commissioners.

3. If the commissioners report that the property, or a particular lot, tract or other portion thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the court may render a supplemental interlocutory judgment reciting the facts and directing that the property or the distinct parcel so circumstanced be sold.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 922, NY RP ACT & PRO § 922
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McKinney's RPAPL § 923

§ 923. Security for credit on sale

Currentness

The portion of the purchase-money for which credit is allowed in the interlocutory judgment shall be secured at interest by a mortgage upon the property sold, with a bond of the purchaser; and by such additional security, if any, as the court prescribes. The officer making the sale may take separate mortgages and other securities in the name of the county treasurer of the county in which the property is situated for such convenient portions of the purchase-money as are directed by the court to be invested; and in the name of the owner, for the share of any known owner of full age who desires to have it invested.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 923, NY RP ACT & PRO § 923
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McKinney's RPAPL § 925

§ 925. Report of sale; confirmation

Currentness

1. Immediately after completing the sale, the officer making it shall file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser and the price.

2. The court shall confirm or set aside the report.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 925, NY RP ACT & PRO § 925
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McKinney's RPAPL § 927

§ 927. Contents of judgment after actual partition

Currentness

Upon the confirmation by the court of the report of the commissioners making partition, final judgment shall be entered directing that each of the parties who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 927, NY RP ACT & PRO § 927
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McKinney's RPAPL § 928

§ 928. Effect of judgment after actual partition

Currentness

A final judgment after actual partition is binding and conclusive upon the following persons, except parties and persons claiming under them whose rights and interests are expressly left unaffected:

1. The plaintiff; each defendant upon whom the summons was served, either personally or without the state or by publication; and his legal representatives.

2. Each person claiming from, through or under such a party, by title accruing after the filing of the judgment-roll, or after the filing in the proper county clerk's office of a notice of the pendency of the action.

3. Each person not in being when the interlocutory judgment is rendered who, by the happening of any contingency becomes afterwards entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was a party specified in the first subdivision of this section.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 928, NY RP ACT & PRO § 928
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McKinney's RPAPL § 929

§ 929. Lien of creditor upon share partitioned

Currentness

After actual partition the lien of a creditor having a lien on an undivided share or interest in the property, who is or is not made a party, shall attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which shall be first charged with its just proportion of the costs and expenses of the action, in preference to the lien.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 929, NY RP ACT & PRO § 929
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McKinney's RPAPL § 931

§ 931. Contents of judgment after sale

Currentness

A final judgment confirming a sale shall direct the officer making it to execute the proper conveyances and take the proper securities pursuant to the sale, and also direct application of the proceeds.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 931, NY RP ACT & PRO § 931
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McKinney's RPAPL § 933

§ 933. Effect of judgment after sale

Currentness

A final judgment after sale is binding and conclusive upon the same persons upon whom a final judgment for actual partition is binding and conclusive; and it bars each of those persons who is not a purchaser at the sale from all right, title and interest in the property sold. It is also a bar against each person not a party who, at the time when it is entered, has a general lien by judgment or decree on the undivided share or interest of a party, if notice was given to appear before the referee and make proof of liens, as prescribed in this article, and also against each person made a party who then has a specific lien on any such undivided share or interest; but a person having any such specific lien appearing of record at the time of the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 933, NY RP ACT & PRO § 933
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McKinney's RPAPL § 941

§ 941. Judgment as to parties having interest in entire property

Currentness

If a tenant by the curtesy or for life or for years of the entire property, or a person entitled to a contingent or vested remainder or reversion in the entire property, or a creditor, or other person, having a lien or interest which attaches to the entire property, be made a defendant in the action, the final judgment either may award to such a party his entire right and interest, or the proceeds thereof, or where the right or interest is contingent, direct that the proceeds or share thereof be substituted for the property and invested for whoever may eventually be entitled thereto, or may reserve and leave unaffected his right and interest, or any portion thereof.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 943

§ 943. Judgment directing compensation to equalize partition

Currentness

Where it appears that partition cannot be made equal between the parties according to their respective rights without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition. But compensation cannot be so awarded against a party who is unknown or whose name is unknown. Nor can it be awarded against an infant unless it appears that he has personal property sufficient to pay it and that his interests will be promoted thereby.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 943, NY RP ACT & PRO § 943
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McKinney's RPAPL § 945

§ 945. Judgment adjusting rents and profits

Currentness

The court may adjust the rights of a party as against any other party by reason of the receipt by the latter of more than his proper proportion of the rents or profits of a share.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 945, NY RP ACT & PRO § 945
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McKinney's RPAPL § 947

§ 947. Judgment affecting state tax claim

Currentness

A judgment affecting adversely the title, interest or claim of the state based upon a tax deed, shall provide in effect as follows:

1. That the state shall have a lien upon such real property or part thereof described in such tax deed, prior and superior to all other liens, (a) for the amount of the unpaid taxes not adjudged illegal in such action for which such real property was sold or liable to be sold in the first instance and for which such tax deed was issued, together with fees, charges and interest; (b) for the amount of the unpaid taxes not adjudged illegal in such action for which such real property was subsequently sold or liable to be sold, together with fees, charges and interest; (c) for the amount of all taxes, fees and charges admitted or paid by the state upon such real property to the date of the entry of such judgment, together with interest thereon from the date of such admission or payment. In the determination of the amount of such lien, establishment of payments of taxes on said land by the adjudged or admitted owner of the property during any of the same years in which payments were also made by the state shall reduce the lien of the state by the larger of the two tax payments for each of the years affected by duplicate payments, and in the event that wholly identical areas are not affected by the duplicate payments the court shall have power to apportion and adjust the amount of the lien as equity may require.

2. That the state may foreclose such lien as a mortgage on real property is foreclosed, provided such lien remains unpaid after the expiration of one year from the entry of such judgment.

The remedy provided by this section for recovery of tax payments shall be in addition to any other remedy now or hereafter available in law or in equity.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 947, NY RP ACT & PRO § 947
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McKinney's RPAPL § 951

§ 951. Recording of judgment

Currentness

A copy, which is certified as correct, of the final judgment may be recorded in the office for recording deeds in each county in which any real property affected is situated.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 951, NY RP ACT & PRO § 951
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McKinney's RPAPL § 961

§ 961. Disposition of proceeds of sale

Currentness

The proceeds of a sale, after deducting the costs and expenses chargeable against them shall be immediately awarded as directed by the final judgment, to the parties whose rights and interests have been sold, in proportion thereto. The sum chargeable upon any share to satisfy a lien thereon shall be paid to the creditor, or retained, subject to the order of the court; and the remainder except as otherwise prescribed in this article, shall be paid by the officer making the sale, to the party owning the share or his legal representatives or into court for his use. The proceedings to ascertain and settle the liens upon an undivided share shall not affect any other party to the action or delay the paying over or investing of money to or for the benefit of any other party upon whose share or interest in the property there does not appear to be any existing lien.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 961, NY RP ACT & PRO § 961
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McKinney's RPAPL § 962

§ 962. Payment of proceeds into court where there are liens

Currentness

If there is any existing lien upon the share or interest of a party in the property, the interlocutory judgment directing the sale shall direct the officer making it to pay into court the portion of the money arising from the sale of the share or interest of that party after deducting the portion of the costs and expenses for which it is liable.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 962, NY RP ACT & PRO § 962
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McKinney's RPAPL § 963

§ 963. Payment of proceeds out of court where there are liens

Currentness

1. Where the proceeds of a sale are paid into court, in a case specified in section 962, the party may apply to the court for an order directing that the money, or such part as he claims, be paid to him, and the court shall make such an order as justice requires. The party shall by affidavit show the amount actually due on each incumbrance, and the name and residence of the owner of the incumbrance, as far as they are known or can be ascertained with due diligence, and showing service of a notice of the application on each owner of an incumbrance. Service of the notice within the state shall be personal, or by leaving it at the owner's residence with some person of suitable age and discretion, at least fourteen days previous to the application. Service without the state, if personal, shall be made at least twenty days previous to the application. If the owner of the incumbrance resides without the state, and the place of his abode cannot be ascertained with reasonable diligence, notice may be served on him by publishing it in such newspaper or newspapers as the court may direct, once in each week for the four weeks immediately preceding the application.

2. When the whole amount of the unsatisfied liens upon an undivided share has been ascertained, the court shall order the portion of the money so paid into court on account of that share to be distributed among the creditors having the liens, according to the priority of each of them. Where the incumbrancer is not a party to the action, the clerk or other officer by whom a lien is paid off shall procure satisfaction to be acknowledged or proved, as required by law, and shall cause the incumbrance to be duly satisfied or cancelled of record. The expense of so doing shall be paid out of the portion of the money in court belonging to the party by whom the incumbrance was payable.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 963, NY RP ACT & PRO § 963
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McKinney's RPAPL § 964

§ 964. Payment of proceeds into court in cases involving decedent's property

Currentness

Where the property has been sold free from the lien of debts, a final judgment, entered before eighteen months have elapsed from the granting of letters of administration or letters testamentary upon the estate of a decedent from whom the plaintiff derived his title, shall direct that the proceeds of the sale remaining after the payment of the costs, referee's fees, expenses of sale, and liens established before the death of the decedent, including any sum allowed to a widow in satisfaction of her right of dower, therein directed to be paid, be paid forthwith into court by the referee making such sale.

A final judgment in such case, entered before eighteen months have elapsed from the granting of letters of administration or letters testamentary upon the estate of a deceased person, who, if living, should be a party to the action, shall direct that the share of the proceeds of such sale, which would have been his, if living, be paid into court by such referee.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 964, NY RP ACT & PRO § 964
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McKinney's RPAPL § 965

§ 965. Payment of proceeds out of court in cases involving decedent's property

Currentness

Money paid into court under section 964 may be paid out of court to such parties as are entitled thereto by order of the court made upon motion of any party, and upon:

1. Notice of motion to the executors or administrators of the decedent and the furnishing of an undertaking that the moving party will pay any and all claims, not exceeding the amount paid into court, when required by order of the court or by order of the surrogate of the surrogate's court in a proceeding to mortgage, lease or sell the real property of such decedent; except that where a final accounting has been had in the estate of such decedent in a surrogate's court, and certified copies of the account and decree of final settlement, showing that all of the debts of the decedent have been paid in full, is filed with the court having jurisdiction of the fund, the court may dispense with the furnishing of an undertaking; or

2. The furnishing of the certificate of the surrogate of the county of which any such decedent was a resident at the time of his death, showing that eighteen months have elapsed since the issuing of letters testamentary or letters of administration, as the case may be, upon the estate of said decedent, and that no proceedings for the mortgage, lease or sale of the real property of such decedent for the payment of his debts or funeral expenses, or both, is pending, and the certificate of the county clerk of the county where the real property sold under the interlocutory judgment is located, showing that no notice of pendency of action in respect to such real property has been filed in his office. The certificate of the surrogate required herein may be executed in the name of the surrogate by the clerk of the surrogate's court under the seal of the court.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 966

§ 966. Payment of proceeds directly to parties in cases involving decedent's property

Currentness

Where the property has been sold free from the lien of debts and the court is furnished with the certificates described in subdivision 2 of section 965, the final judgment shall direct payment of the proceeds of sale to such parties as are entitled thereto.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 966, NY RP ACT & PRO § 966
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McKinney's RPAPL § 967

§ 967. Payment of proceeds to owner of particular or future estate

Currentness

A party who has a right of dower, or is a tenant for life or for years, in or of an undivided share of the property sold, or has an inchoate right of dower or any other future right or estate, vested or contingent, or any person not in being who by any contingency may become entitled to any interest or estate in the property sold, is entitled to have a proportion of the proceeds of the sale invested, secured or paid over, in such manner as the court deems calculated to protect the rights and interests of the parties.

Credits
(Added L.1962, c. 312, § 23.)

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McKinney's RPAPL § 968

§ 968. Manner of payment of proceeds to owner of particular or future estate

Currentness

Whenever the whole or a part of the proceeds of a sale represents the interest of a particular estate, and also represents one or more other interests subsequent thereto, the power to determine whether the owner of the particular estate shall receive, in satisfaction of his estate or interest, a sum in gross or shall receive the earnings, as they accrue, of a sum invested for his benefit in permanent securities at interest, rests in the discretion of the court, except that if all parties affected shall have agreed either to the payment of a sum in gross or the investment of the proceeds the court shall, by order, give effect to such agreement. The application of the owner of any such particular estate for the award of a sum in gross shall be granted unless the court finds that unreasonable hardship is likely to be caused thereby to the owner of some other interest in the affected real property. The application for the award of a sum in gross by the owner of some interest in the affected real property other than the owner of the particular estate shall be granted if the court finds that the granting of such application is equitable under the circumstances.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 968, NY RP ACT & PRO § 968
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McKinney's RPAPL § 969

§ 969. Shares of infant, incompetent or conservatee

Currentness

Where a party entitled to receive a portion of the proceeds of sale is an infant, incompetent or conservatee, such portion may be disposed of as follows:

1. The court may direct it to be invested in permanent securities in the name and for the benefit of the infant, incompetent or conservatee, or it may direct it to be paid over to the general guardian of the infant, committee of the incompetent or conservator of the conservatee, when the guardian, committee conservator shall have executed an undertaking to such infant, incompetent or conservatee; or,

2. Where a general guardian, committee or conservator has been appointed, upon proof that it will be for the best interest and advantage of the estate of such infant, incompetent or conservatee person, the court may authorize and direct such guardian, committee or conservator, in the name of such infant, incompetent person or conservatee, to make application for an award of a sum in gross as provided in section 968; or,

3. If any of the moneys arising from the proceeds of such sale shall have been paid to the county treasurer, and on due proof that such money has remained uninvested in permanent securities for the space of three months, the court may direct the same to be paid to the general guardian, committee or conservator of such infant, incompetent or conservatee upon his giving an undertaking for the faithful execution of his trust; where said sum in hands of county treasurer does not exceed the sum of one thousand dollars the court may direct the same to be paid in accordance with subdivision five of this section; or,

4. In the case of an infant, incompetent or conservatee residing without the state and having in the state or country where he or she resides a general guardian, committee or conservator, or person duly appointed under the laws of such state or country to the control, and entitled by the laws of such state or country to the custody, of the money of such infant, incompetent or conservatee, the court, upon satisfactory proof of such facts and of the sufficiency of the undertaking given by such general guardian, committee or conservator or person in such state or country by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant, incompetent or conservatee arising upon such sale shall be paid over to such general guardian, committee or conservator or person; or,

5. If the portion of the proceeds arising upon such sale which belongs to an infant, incompetent or conservatee residing within or without the state does not exceed one thousand dollars, the court may direct that the same may be paid to his father, or to his mother or to some competent person with whom the infant, incompetent or conservatee resides, or who has some interest in his welfare, for the use and benefit of such infant, incompetent or conservatee.

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Credits
(Added L.1962, c. 312, § 23. Amended L.1981, c. 115, § 73.)

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McKinney's RPAPL § 970

§ 970. Shares of unknown or absent owner

Currentness

Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the state or by publication, and he has not appeared in the action, the court shall direct his portion to be paid into court and invested in permanent securities at interest, for his benefit, until claimed by him or his legal representatives.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 970, NY RP ACT & PRO § 970
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McKinney's RPAPL § 971

§ 971. Security for refund

Currentness

The court, in its discretion, may require any person, before he receives his portion of the proceeds of the sale to give such security as it directs, to the state, or the county treasurer, who shall hold it for the use and benefit of the persons interested, or to such parties or other persons as it prescribes, to refund the same, or a portion, thereof, with interest, if it thereafter appears that he was not entitled thereto.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 971, NY RP ACT & PRO § 971
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McKinney's RPAPL § 973

§ 973. Report of disposition of proceeds

Currentness

Within sixty days after the entry of final judgment, unless such time be extended by an order of the court entered in the office of the clerk within said sixty days, the officer making the sale shall file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 973, NY RP ACT & PRO § 973
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McKinney's RPAPL § 981

§ 981. Costs and expenses

Currentness

1. The final judgment for the partition of the property must also award that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including the additional allowance. The sum to be paid by each must be fixed by the court according to the respective rights of the parties, and specified in the judgment.

2. If a defendant is unknown, his proportion of the costs shall be fixed and specified in like manner. An execution against an unknown defendant may be issued to collect the costs awarded against him as if he were named in the judgment; and his right, share or interest in the property may be sold by virtue thereof as if he were named in the execution.

3. Where final judgment confirming a sale is rendered, the costs of each party to the action and the expenses of the sale, including the officer's fees, shall be deducted from the proceeds of the sale and distributed as the court shall order. But the court, in its discretion, may direct that the costs and expenses of any trial, reference or other proceeding in the action be paid out of the share of any party in the proceeds, or may render judgment against any party therefor. Where a proportion of the proceeds is to be paid to or invested for the benefit of any person, as prescribed in any provision of this article, the amount thereof must be determined by the residue of the entire proceeds remaining after deducting the costs and expenses chargeable against them.

4. The officer making the sale shall pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale.

5. After actual partition, the fees and expenses of the commissioners, including the expense of a survey when it is made, shall be taxed under the direction of the court, and the amount thereof shall be paid by the plaintiff and allowed as part of his costs.

6. Fees of surveyor or commissioner in action for partition. The fees of a surveyor and a surveyor's assistant, employed as prescribed by law in an action for partition, and of a commissioner appointed as prescribed by law to make partition, shall be the same as those provided by section 1052 of this chapter for services rendered in an action for dower.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 981, NY RP ACT & PRO § 981

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McKinney's RPAPL § 991

§ 991. Proceeding for share of unknown heirs; presumption of death; service

Currentness

1. Where a portion of the proceeds of the sale is paid into court for unknown heirs and is unclaimed by any person entitled thereto for twenty-five years after such payment the unknown heirs are presumed to have been dead at the time of the sale. A special proceeding may be commenced for the distribution of such proceeds to the persons entitled thereto.

2. The notice of petition and petition shall be served upon the unknown heirs or their representatives, the known heirs, their next of kin, representatives or distributees, and all persons interested in such proceeds. Service shall be made at least twenty days before the time at which the petition is noticed to be heard. Each of the known persons within the state, and the comptroller of the state if any proceeds have been paid over to him by a county treasurer, shall be served personally. All other persons shall be served in the manner prescribed for the service by publication of a summons.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 991, NY RP ACT & PRO § 991
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's RPAPL § 992

§ 992. Judgment in proceeding for share of unknown heirs

Currentness

Unknown heirs or their representatives not appearing shall be barred from any interest and the court shall render a judgment that the interest of such unknown heirs was vested in the known heirs of the ancestor from whom the unknown heirs derived title and that the proceeds be paid out of court to the persons entitled thereto.

Credits
(Added L.1962, c. 312, § 23.)

McKinney's R. P. A. P. L. § 992, NY RP ACT & PRO § 992
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's RPAPL § 993

§ 993. Uniform partition of heirs property act

Effective: December 6, 2019
Currentness

1. Short title. This section shall be known as the "uniform partition of heirs property act".

2. Definitions. For purposes of this section, the following terms shall have the following meanings:

(a) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from such other individual.

(b) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not such other individual's ascendant or descendant.

(c) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from such other such individual.

(d) "Determination of value" means a court order determining the fair market value of heirs property under subdivision six or ten of this section or adopting the valuation of the property agreed to by all co-tenants.

(e) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;

(ii) any of the co-tenants acquired title from a relative, whether living or deceased; and

(iii) any of the following applies:

(A) twenty percent or more of the interests are held by co-tenants who are relatives;

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(B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;

(C) twenty percent or more of the co-tenants are relatives of each other; or

(D) any co-tenant who acquired title from a relative resides in the property.

(f) “Partition by sale” means a court-ordered sale of the entire heirs property, or the portion thereof in which any co-tenant who acquired title from a relative resides, whether by auction, sealed bids, or open-market sale conducted under subdivision ten of this section.

(g) “Partition in kind” means partition or division of heirs property into physically distinct and separately titled parcels.

(h) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(i) “Relative” means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than under this section.

3. Applicability; relation to other law. (a) This section applies to partition actions filed on or after the effective date of this section.

(b) In any action to partition real property, the court shall determine, after notice and the right to be heard afforded to each party, whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record.

(c) This section shall supplement the general partition statute of this article and, if an action is governed by this section, shall replace the provisions of such general partition statute that are inconsistent with this section.

4. Service; notice by posting. (a) This section shall not limit or affect the method by which service of a complaint in a partition action may be made.

(b) If the plaintiff in a partition action seeks an order of notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than ten days after the court's determination, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action. The sign shall state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

5. Settlement conference. (a) In any partition action of heirs property, plaintiffs shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when a request for judicial intervention is filed, or on such adjourned date as has been agreed to by the parties, for the purpose of

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holding settlement discussions pertaining to the relative rights and obligations of the parties with respect to the subject property including, but not limited to, as set forth in this section.

(b) Upon the filing of a request for judicial intervention, the court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending. Plaintiff shall post a copy of the settlement conference notice in a conspicuous place on the property within twenty days of the date of the notice.

(c) The settlement conference may be adjourned or reconvened from time to time as appropriate during the pendency of the partition action. At any conference held pursuant to this section, the plaintiffs and the defendants shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the entirety or any portion of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant.

(d) At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall (i) advise the defendant of the requirement to answer the complaint, (ii) explain what is required to answer a complaint in court, (iii) advise that the ability to contest the partition action and assert defenses may be lost if an answer is not interposed, (iv) set a deadline for any co-tenants requesting partition by sale, and (v) provide information about available resources for legal assistance. A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule three hundred twenty of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived, within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

(e) Both the plaintiffs and defendants shall negotiate in good faith to reach a mutually agreeable resolution including, but not limited to, a tenancy in common agreement, a co-tenant buyout and the allocation, mechanics and financing thereof as provided in subdivision seven of this section, a partition in kind as provided in subdivisions eight and nine of this section, an open market sale as provided in subdivision ten of this section, or any other agreement or loss mitigation that is fair and reasonable considering the totality of factors listed in paragraph (a) of subdivision nine of this section.

(f) If the parties do not reach a mutually agreeable resolution, the referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process shall make a report of findings of fact, conclusions of law and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to paragraph (e) of this subdivision. If the court determines a plaintiff has failed to negotiate in good faith, the partition action shall be dismissed.

(g) Any motions submitted by any party to the action may be held in abeyance while the settlement conference process is ongoing, except for motions concerning (i) a determination of the percentage interests, if any, owned by any alleged co-tenant if such interests are in dispute and (ii) compliance with this rule and its implementing rules including applications to extend in the interests of justice any deadlines fixed herein.

(h) In addition to any other qualifications otherwise required, each commissioner appointed under section nine hundred fifteen of this article and any officer appointed to conduct a sale shall be disinterested, impartial and not related to a party to or participant in the action.

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6. Determination of value. (a) If the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the heirs property for purposes of subdivision seven of this section as follows, utilizing paragraph (d) of this subdivision, unless it has determined that paragraph (b) or (c) of this subdivision apply.

(b) If all co-tenants have agreed to the value of the property or to another method of valuation, the court shall adopt such value or the value produced by the agreed method of valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice of the value to the parties.

(d) If paragraph (b) or (c) of this subdivision do not apply, the court shall order an appraisal by a disinterested real estate appraiser licensed in this state to determine the fair market value of the property. Any determination of value under paragraph (c), (d), (f) or (g) of this subdivision shall assume sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) Not later than ten days after an appraisal is filed under paragraph (d) of this subdivision, the court shall send notice to each party with a known address, stating:

(i) the appraised fair market value of the property plus the allowed cost of the appraisal;

(ii) that the appraisal is available at the clerk's office; and

(iii) that a party may file with the court an objection to the appraisal not later than thirty days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to paragraph (d) of this subdivision, the court shall conduct a hearing to determine the fair market value of the property not sooner than thirty days after a copy of the notice of the appraisal is sent to each party under paragraph (e) of this subdivision, whether or not an objection to the appraisal is filed under subparagraph (iii) of paragraph (e) of this subdivision. In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under paragraph (f) of this subdivision, but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

7. Co-tenant buyout. (a) Every co-tenant who requests or joins a request for partition of heirs property by sale has thereby agreed that his or her interest may be acquired in accordance herewith at the value determined under subdivision six of this section by the co-tenants who have not sought or joined in the request for partition by sale. Upon determination that the property is heirs property and prior to the determination of value under subdivision six of this section, the court shall send notice to all parties identifying the owners of interests that have sought partition by sale, the percentage interests such owners allege to hold and

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of the right of the remaining co-tenants to avert partition by sale by exercising the right to purchase all of the interests of the co-tenants who requested partition by sale.

(b) Not later than forty-five days after the notice of the determination of value under subdivision six of this section is sent and by the date specified in such notice, any co-tenant, except a co-tenant that requested partition by sale, may give notice to the court of the total amount of percentage interests subject to purchase that he or she elects to buy; provided, however, the court shall make a determination of each co-tenant's percentage ownership interest in the property prior to sending notice of the determination of value if such interest is in dispute and shall consider all facts as determined by the court and presented by the parties, and all laws and rules that govern the transfer, succession and acquisition of title through probate, intestacy or otherwise.

(c) The purchase price for percentage interests shall be the value of the entire parcel determined under subdivision six of this section multiplied by the aggregate amount of the percentage interests subject to purchase.

(d) After expiration of the period in paragraph (b) of this subdivision, the following rules apply:

(i) If one or more co-tenants have elected in the aggregate to buy at least the total amount of percentage interests subject to purchase, the court shall notify all the parties of such fact.

(ii) If the electing co-tenants' offers equal or exceed the amount of percentage interests subject to purchase, the court shall allocate the right to buy those interests among the electing co-tenants based on each electing co-tenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all co-tenants electing to buy, reserving priority, first, to electing co-tenants who acquired the interest from a relative and reside in the property and, second, to all other electing co-tenants who acquired their interest from a relative, and send notice to all the parties of the foregoing and of the price to be paid by each electing co-tenant.

(iii) If co-tenants with the right to elect fail to elect to purchase the entirety of the interests of the co-tenants whose interests are subject to purchase, the court shall send notice to all the parties of such fact and resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section.

(e) If the court sends notice to the parties under subparagraph (i) or (ii) of paragraph (d) of this subdivision, the court shall set a date, not sooner than sixty days after the date the notice was sent, by which electing co-tenants must pay their apportioned price into the court. After this date, the following rules apply:

(i) If all electing co-tenants timely pay his or her apportioned price to the court, the court shall issue an order reallocating all the interests of the co-tenants and disburse the amounts held by the court to the persons entitled to them.

(ii) If no electing co-tenant timely pays his or her apportioned price, the court shall resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section as if the interests of the co-tenants that requested partition by sale were not purchased.

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(iii) If one or more, but not all, of the electing co-tenants fail to pay their apportioned price on time, the court, on motion, shall give notice to the electing co-tenants that paid their apportioned price of percentage of the unpurchased interests remaining and the price for all such interests.

(f) Not later than twenty days after the court gives notice pursuant to subparagraph (iii) of paragraph (e) of this subdivision, any co-tenant that paid his or her apportioned price may elect to purchase all of the remaining interest by paying the entire price to the court. After the twenty day period, the following rules shall apply:

(i) If only one co-tenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to such co-tenant. The court shall issue promptly an order reallocating the interests of all of the co-tenants and disburse the amounts held by the court to the persons entitled to such amounts.

(ii) If no co-tenant pays the entire price for the remaining interest, the court shall resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section as if the interests of the co-tenants that requested partition by sale were not purchased.

(iii) If more than one co-tenant pays the entire price for the remaining interest, the court shall reapportion those remaining interests among those paying co-tenants, based on each paying co-tenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all co-tenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the co-tenants' interests, disburse the amounts held by the court to the persons entitled to such amounts, and promptly refund any excess payment held by the court.

(g) Not later than forty-five days after the court sends notice to the parties pursuant to paragraph (a) of this subdivision, any co-tenant entitled to buy an interest under this subdivision may request the court to authorize the sale as part of the pending action of the interests of co-tenants named as defendants and served with the complaint but that did not appear in the action.

(h) If the court receives a timely request under paragraph (g) of this subdivision, the court, after a hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(i) a sale authorized under this subdivision may occur only after the purchase prices for all interests subject to sale under paragraphs (a), (b), (c), (d), (e) and (f) of this subdivision have been paid to the court and such interests have been reallocated among the co-tenants as provided in such paragraphs; and

(ii) the purchase price for the interest of a non-appearing co-tenant is based on the court's determination of value under subdivision six of this section.

8. Partition alternatives. (a) If all the interests of all co-tenants that requested partition by sale are not purchased by other co-tenants pursuant to subdivision seven of this section, or if after conclusion of the buyout under subdivision seven of this section, a co-tenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in subdivision nine of this section, finds that partition in kind will result in great manifest prejudice to the co-tenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

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(b) If the court does not order partition in kind under paragraph (a) of this subdivision, the court shall order partition by sale pursuant to subdivision ten of this section provided that, if no co-tenant timely requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to paragraph (a) of this subdivision, the court may require that one or more co-tenants pay one or more other co-tenants amounts so that the payments, taken together with the value of the in kind distributions to the co-tenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, the court shall allocate to the co-tenants that are unknown, cannot be located, or the subject of a default judgment, if the co-tenants interests were not bought out pursuant to subdivision seven of this section, a part of the property representing the combined interests of such co-tenants as determined by the court and such part of the property shall remain undivided.

9. Considerations for partition in kind. (a) In determining under subdivision eight of this section whether partition in kind would result in great manifest prejudice to the co-tenants as a group, the court shall consider the following:

(i) whether the heirs property practicably can be divided among the co-tenants;

(ii) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the amount reasonably expected to be realized if the property were sold as a whole, taking into account the conditions under which a court-ordered sale likely would occur;

(iii) evidence of the collective duration of ownership or possession of the property by a co-tenant and one or more predecessors in title or predecessors in possession to the co-tenant who are or were relatives of the co-tenant or each other;

(iv) a co-tenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the co-tenant;

(v) the lawful use being made of the property by a resident or other co-tenant and the degree to which any such co-tenant would be harmed if the co-tenant could not continue the same use of the property;

(vi) the degree to which the co-tenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property;

(vii) the price, terms and conditions of the acquisition of the co-tenant's interest in the property if such co-tenant is not a relative of the person from whom it acquired his or her interest; and

(viii) any other relevant factor.

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(b) The court shall not consider any one factor in paragraph (a) of this subdivision to be dispositive without weighing the totality of all relevant factors and circumstances.

10. Open-market sale, sealed bids, or auction. (a) If the court orders a sale of heirs property, notwithstanding section two hundred thirty-one of this chapter, such sale shall be an open-market sale under this subdivision unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the co-tenants as a group.

(b) If the court orders an open-market sale and the parties, not later than ten days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the broker appointed under paragraph (b) of this subdivision obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(i) the broker shall comply with the reporting requirements in subdivision eleven of this section; and

(ii) the sale may be completed in accordance with the laws of this state other than this section.

(d) If the broker appointed under paragraph (b) of this subdivision does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after a hearing, may:

(i) order that the property continue to be offered for an additional time, by the same or a substitute broker, in accordance with paragraph (b) of this subdivision; or

(ii) if it determines that doing so would not be in the best interests of the parties, approve the highest outstanding offer.

(e) If after the court has appointed a substitute broker and there are no reasonable offers for the property, the court may order the property be sold by sealed bids or an auction and, the court shall set terms and conditions of the sale. If the court orders an auction, the auction shall be conducted in accordance with section two hundred thirty-one of this chapter.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the net proceeds.

11. Report of open-market sale. (a) Unless required to do so within a shorter time by this article, a broker appointed under paragraph (b) of subdivision ten of this section to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under subdivision six or ten of this section.

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(b) The report required by paragraph (a) of this subdivision shall contain the following information:

(i) a description of the property to be sold to each buyer;

(ii) the name of each buyer;

(iii) the proposed purchase price;

(iv) the terms and conditions of the proposed sale, including the terms of any owner financing;

(v) the amounts to be paid to lienholders;

(vi) a statement of contractual or other arrangements or conditions of the broker's commission; and

(vii) other material facts relevant to the sale.

Credits
(Added L.2019, c. 596, § 1, eff. Dec. 6, 2019.)

McKinney's R. P. A. P. L. § 993, NY RP ACT & PRO § 993
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McKinney's General Obligations Law § 3-309

§ 3-309. Husband and wife may convey to each other or make partition

Currentness

Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.

Credits
(L.1963, c. 576, § 1.)

McKinney's General Obligations Law § 3-309, NY GEN OBLIG § 3-309
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- Ursinus College, B.A., cum laude, 1979

Professional and Civic Associations

- Member, Port Jefferson Lions Club
- Member, Miller Place-Mount Sinai Historical Society
- Member, New York State Bar Association
- Member, Suffolk County Bar Association
- Member, Matrimonial Bar Association of Suffolk County

Procedures relating to Partition Actions -
(other than under Section 993 of the Real Property and Actions Law)

1. What type of action is an action for Partition ?

2. Who may be entitled to bring a Partition action ?

3. Against whom may a Partition action be brought ?

4. How do you determine who may be a Defendant ?

5. Necessary Defendants vs. Permissible Defendants

6. Preliminary investigation

a. Work with Title Company to do a Title search, with "necessary defendant" certification.

7. The Pleadings

a. Requirements of the Complaint

b. Defenses

8. If there are issues relating to Title, as alleged by Plaintiff, a trial may be necessary.

a. Issues of fact may be tried by a jury.

9. What else is determined by the Court (or jury).

a. The rights, shares and interests of the parties needs to be ascertained.

b. Whether the property is so circumstanced that a partition cannot be made without great prejudice to the owners.

10. In certain cases, a Referee may be appointed to ascertain the rights , shares and interests of the parties.

11. Other matters to be ascertained by the Court or Referee.

a. Existence of creditors who may have a lien against the property.

b. If there are no creditors, having a search certified by title company.

c. Notice to Creditors from Referee published in newspaper.

12. The Interlocutory Judgment

a. The IJ determines the parties' rights, shares and interests in the property.

b. It also determines whether there can be a "physical" partition or whether such a partition would result in "great prejudice " to the owners.

c. If "great prejudice" would result to the owners, then the IJ shall direct the property to be sold at public auction.

d. If the property can be "physically" partitioned, the IJ shall designate 3 reputable and disinterested freeholders as "commissioners" to make the partition so directed.

13. Actual Partition

a. Commissioner meeting - to make the partition.

b. They may use a surveyor to assist in placing the monuments to designate the several parcels.

c. A majority of the commissioners are determinative.

d. The Commissioners make a Report to include specific content required by the statute. And their report gets filed with the Clerk.

e. The Court then either confirms or sets aside the Report.

f. The Court may render a supplementary Interlocutory Judgment and direct the property to be sold if the Commissoiners find that an actual partition will result in great prejudice to the owners.

g. The Court has the authority to appoint new Commissioners if it finds that is necessary.

14. Judgment involving Actual Partition

a. Contents of Judgment

b. Effect of Judgment

15. Sale of the Property

a. Report of Sale by officer in charge of sale

b. Court shall confirm or set aside Report.

16. Judgment involving Sale of Property

a. Contents of Judgment

b. Effect of Judgment

c. Judgment adjusting rents and profits.

17. Recording of Judgment

18. Disposition of Proceeds

a. Report of Disposition of Proceeds.

stewart title

NEW YORK METRO
800-853-4803
914-997-1698 fax
stewart.com/nymetro

STEWART TITLE INSURANCE COMPANY

does hereby certify to:

Peter M. Mott, Esq.
Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP
33 West Second Street, P. O. Box 9398
Riverhead, NY 11901

That it has caused a search to be made for a PARTITION ACTION against the premises described herein and has found only the returns as set forth in the following pages.

This Company's liability under this Certificate, for any reason whatsoever, shall not exceed $1,000.00 (One Thousand Dollars) and shall be confined to the Applicant to whom this Certificate is addressed.

NO policy of insurance is to be issued hereunder.

STEWART TITLE INSURANCE COMPANY

Paula Klein

PAULA KLEIN
Title Officer

TAX MAP DESIGNATION:
District:
Section:
Block:
Lot:

TITLE NUMBER: ST16-27637

DATED: 7/19/2016

NEW YORK METRO
800-853-4803
914-997-1698 fax
stewart.com/nymetro

stewart title

CERTIFY NECESSARY PARTIES FOR AN ACTION IN PARTITION UNDER REAL PROPERTY ACTION AND PROCEEDINGS LAW, SECTION NO. 901:

PARTIES	INTEREST IN PREMISES
1. [illegible] N[illegible]	Fee Owner by virtue of deed dated 6/29/1979 and recorded 7/6/1979 [illegible]
2. [illegible]	Mortgagee by virtue of mortgage recorded 7/6/1979
3. HEIRS AT LAW, NEXT OF KIN AND DISTRIBUTEES OF THE ESTATE OF [illegible]	NOTE: No proof of death found in Suffolk County Surrogates Court
4. INTERNAL REVENUE SERVICE	Possible Federal Estate Taxes
5. NEW YORK STATE DEPT. OF TAXATION AND FINANCE	Possible NYS Estate Taxes
6. OFFICE OF THE COUNTY TREASURER 330 Center Drive Riverhead, NY 11901	Unpaid 2015/2016 real estate taxes
7. COUNTY OF SUFFOLK 330 Center Drive Riverhead, NY 11901	Unpaid 2014/2015 real estate taxes Sold to Suffolk County 12/4/2015
8. "JOHN DOE" and "JANE DOE"	Tenants or persons in possession

NOTE: Suffolk County Tax Map Designation shows premises a

NOTE: If any of the aforementioned persons be dead, their legal representatives and successors in interest should be made parties defendant after search has been amended. If investigation or physical inspection of premises by applicant discloses that there are other persons having an interest in the property, such persons should also be made parties defendant after search has been amended.

NEW YORK METRO
800-853-4803
914-997-1698 fax
stewart.com/nymetro

stewart title

SCHEDULE A – DESCRIPTION

Title No. ST16-27637

Suffolk County Clerk's Office.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

Index No. _____,

Plaintiffs,

-against-

COMPLAINT

_____,

INTERNAL REVENUE SERVICE,
NEW YORK STATE DEPT. OF TAXATION AND FINANCE, OFFICE OF THE SUFFOLK COUNTY TREASURER, COUNTY OF SUFFOLK,
JOHN DOE and JANE DOE,

Defendants.
----------X

Plaintiffs, _____, by their attorneys, _____as and for their Complaint against the Defendants, respectfully allege:

NATURE OF THIS ACTION

1. This is an action for Partition of the real property located at_____, N.Y. shown on the Suffolk County Tax Map as District_____, Section___, Block___, Lot _____(herein "the subject property"), and more particularly described, as follows:

ALL that certain plot, piece or parcel of land, situate, lying and being
_____
_____
_____

THE PARTIES

2. Plaintiff, _____, resides at _____New York; and is the daughter of the late_____, who died a resident of New York in 2011, and the late_____, who died a resident of New York in 2014 (hereinafter collectively referred to as "the Decedents").

3. Plaintiff_____,resides at_____; and is the son of the Decedents.

4. Defendant, _____, resides at_____; and is the son of the Decedents.

5. Defendant,_____, resides at_____; and is the daughter of the Decedents.

6. Defendant, _____, resides at_____; and is the son of the Decedents.

7. Defendant,_____,resides at_____; and is the daughter of the Decedents.

8. Upon information and belief, Defendant_____ holds a mortgage lien interest against the subject property.

9. Defendant, INTERNAL REVENUE SERVICE (hereinafter "IRS"), is a division of the Federal Government with an address of 271 Cadman Plaza East, Brooklyn, New York. Defendant IRS is

a possible holder of a lien against the subject property for unpaid Federal Estate Taxes.

10. Defendant, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE is a division of the State of New York with an address of WA Harriman State Campus, Building 9, Albany, New York. Defendant NYS Department of Taxation and Finance is a possible holder of a lien against the subject premises for unpaid New York State Estate Taxes.

11. Defendant, COUNTY OF SUFFOLK (hereinafter "County of Suffolk"), is a government entity with an address of 100 Veterans Memorial Highway, Hauppauge, New York, 11788. Defendant County of Suffolk is a possible owner of an interest in the subject premises as a result of unpaid real property estate taxes.

12. Defendant, OFFICE OF THE COUNTY TREASURER (hereinafter "Office of the County Treasurer"), is a division of the County of Suffolk with an address of 330 Center Drive, Riverhead, New York 11901. This Defendant is a possible holder of a lien against the subject premises for unpaid real property taxes.

13. Defendants, JOHN DOE and JANE DOE (hereinafter "John Doe and Jane Doe") are possible tenants or persons in possession of the subject premises and are named as necessary parties herein due to their potential interest(s) in this

litigation arising from his and/or her aforementioned possession.

14. Upon information and belief, Plaintiffs, _____and Defendants_____, are the owners, as tenants-in-common, of certain real property located at_____, New York, Section_____, Block_____, Lot_____.

AS AND FOR A CAUSE OF ACTION FOR PARTITION

15. By Deed dated_____, the Decedent, _____acquired a 100% fee ownership interest in the subject property.

16. Thereafter, the Decedent died intestate in 2011 seized and possessed of the subject property.

17. Upon information and belief, the heirs at law and intestate distributees of her estate upon her death, were: (1) her surviving husband, _____, and (2) her surviving children, to wit: _____(hereinafter collectively referred to as “the parties”).

18. Upon information and belief, the Decedent, _____died intestate in 2014 seized and possessed of an interest in the subject premises, as aforementioned.

19. Upon information and belief, _____was not married at the time of his death, and the heirs at law and intestate distributees of his estate upon his death were the parties.

20. Upon information and belief, each of the parties are seized and possessed as a tenant-in-common of an undivided one-sixth (1/6) interest of the subject property.

21. Upon information and belief, the subject property is subject to a Mortgage held by Defendant_____ recorded on_____ in Liber ____ Page ___.

22. Upon information and belief, the subject property is subject to a lien for unpaid _____real property taxes.

23. Upon information and belief, the subject property is subject to a lien for unpaid _____real property taxes.

24. Upon information and belief, except as otherwise alleged in this Complaint, there are no liens or encumbrances of record on the subject property.

25. Upon information and belief, except as otherwise alleged herein, no person other than the parties named in this action have any interest in the subject property, as owners, creditors or otherwise.

26. Upon information and belief, all the parties to this action are of full age and competency, and under no disability.

27. Division or partition of the subject property, according to the respective rights, shares and interests of the parties, cannot be had without great prejudice to the owners thereof, and a sale of the subject premises is necessary.

28. Plaintiffs are entitled to an Order directing the partition and/or sale of the subject property and the appointment of a referee to be empowered to sell the subject premises.

29. From the monies arising from the sale of the subject premises, any outstanding liens of creditors must be paid in full.

30. That the rights, shares and interests of the parties in the subject property should be ascertained by a reference prior to Judgment in accordance with the Statute.

31. From the monies arising from the sale of the subject premises, Plaintiffs are entitled to be awarded their attorneys fees, expenses and costs relating to this action.

32. After payments of any outstanding liens to creditors, and the payment of monies due and owing the Plaintiffs for attorney’s fees and expenses and costs of this action, the remaining residue of the monies arising from the sale of the subject property should be divided and paid to the parties in

accordance with the Court's determination of their respective rights, shares and interests in the subject property.

33. The parties do not own any other lands or real property in common.

34. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment, as follows:

1) Determining the rights, shares and interests of the parties by reference or otherwise;

2) Determining the rights and interests of creditors of the subject property;

3) Directing the partition and/or sale of the subject property, under the direction of a Court appointed referee, and conveyance to a bona fide purchaser for value determined to be acceptable by the Court;

4) That out of the monies arising from the sale, the liens and mortgage of creditors be paid in full;

5) That Plaintiffs be awarded monies for expenses advanced and attorneys fees, expenses and costs and disbursements of this action; and

6) Awarding Plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: _____

Twomey, Latham, Shea, Kelley,
Dubin & Quartararo, LLP

By:_____

Peter M. Mott, Esq.
Attorneys for Plaintiffs
33 West Second Street
Riverhead, NY 11901
(631) 727-2180

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

Index No. _____,

Plaintiffs,

-against-

COMPLAINT

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INTERNAL REVENUE SERVICE,
NEW YORK STATE DEPT. OF TAXATION AND FINANCE, OFFICE OF THE SUFFOLK COUNTY TREASURER, COUNTY OF SUFFOLK,
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2. Plaintiff, _____, resides at _____New York; and is the daughter of the late_____, who died a resident of New York in 2011, and the late_____, who died a resident of New York in 2014 (hereinafter collectively referred to as "the Decedents").

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4. Defendant, _____, resides at_____; and is the son of the Decedents.

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6) Awarding Plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: _____

Twomey, Latham, Shea, Kelley,
Dubin & Quartararo, LLP

By:_____

Peter M. Mott, Esq.
Attorneys for Plaintiffs
33 West Second Street
Riverhead, NY 11901
(631) 727-2180

Paula J. Warmuth, Esq.

PAULA J. WARMUTH attended the State University of New York at Stony Brook and received a BA degree magna cum laude with a dual major in psychology and elementary education and a MA degree in liberal studies. Mrs. Warmuth graduated from St. John's University School of Law with a degree of Juris Doctor cum laude where she was ranked second in her night school graduating class. While at St. John's, Mrs. Warmuth received three awards including the American Jurisprudence Awards for excellent achievement in the study of Property II and Trusts and Estates as well as the New York State Trial Lawyer's Association Louis R. Harold's Memorial Award for excellence in the field of Tort Law. Mrs. Warmuth was admitted to the New York State Bar on March 25, 1981. Mrs. Warmuth has been employed by Stim & Warmuth, P.C., formerly Joseph D. Stim, P.C., since 1975. In August 1981, shortly after she was admitted to the Bar, Mrs. Warmuth became a partner of Stim & Warmuth, P.C. Mrs. Warmuth belongs to the New York State Bar Association and the Suffolk County Bar Association where she sits on the Judicial Screening and Grievance committees and served co-chair of the Appellate Practice Committee (2013-2015). She frequently volunteers to provide pro-bono legal services as part of the Bar Association's foreclosure settlement project. Mrs. Warmuth is admitted to practice in all New York State Courts, the United States Supreme Court, the Second Circuit Court of Appeals and the U.S. District Courts for the Eastern, Southern, Northern and Western Districts of New York.

Continuing Legal Education Seminars:

- Coordinator/Speaker "Bankruptcy Issues for Creditors' Attorneys" 2016
- Coordinator/Speaker "Appellate Ethics" 2014
- Speaker "Electronic Disclosure in Madoff Adversary Proceedings" 2012

Publications:

- Special Section Editor for Mock Trial (The Suffolk Lawyer, February 2020) "My
- Father's Appeal" (The Suffolk Lawyer, January 2018)
- "Finality in Bankruptcy Appeals (The Suffolk Lawyer, June 2016)
- "Practical Uses of Second Department Website" (The Suffolk Lawyer, February 2015) Special
- Section Editor for Appellate Practice (The Suffolk Lawyer, October 2014)

The Reference

Speaker:

Paula J. Warmuth, Esq., Stim & Warmuth, P.C.
Richard J. Kaufman, Esq.

Timetable: 30 minutes

Outline:

A. Obtaining Referee

RPAPL §911 - If a defendant has made default in appearing or pleading, or the rights of the parties are not controverted, or a party be an infant, absentee or unknown, the court shall ascertain the rights, shares and interests of the several parties in the property, by a reference or otherwise, before interlocutory judgment is rendered.

Plaintiff proceeds by notice of motion for appointment of referee. Sample notice of motion, affirmation in support, affidavit in support and proposed order annexed.

Proposed order appoints the referee and directs the referee to ascertain and report the rights, shares and interests of the several parties to the property.

B. Before the Reference - Inquiry as to creditors

RPAPL §913(1) - Before an interlocutory judgment for the sale of real property is rendered the court shall ascertain, by reference or otherwise, whether there is any creditor not a party who has a lien on the undivided share or interest of any party. A search certified by the clerk or by the clerk and register of the county where the property is situated that there is no such outstanding lien is sufficient proof of the absence of such creditor.

Plaintiff orders title and lien search
Expense of title and lien search is expense of reference

RPAPL §913(2) - Where a reference is directed, the referee shall cause a notice to be published once in each week for four

successive weeks in such newspaper published in the county wherein the place of trial is designated as shall be designated by the court directing said reference, and also, where the court so directs, in a newspaper published in each county wherein the property is situated, requiring each person not a party to the action who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee at a specified place and on or before a specified day to prove his lien and the true amount due or to become due to him by reason thereof. he referee shall report to the court with all convenient speed the name of each creditor whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof and the amount due or to become due thereupon.

Plaintiff prepares notice of hearing

Consult with Advertising Service, Referee and Opposing Counsel regarding date

Sample legal notices annexed

Plaintiff arranges for publication of notice of hearing

Expense of publication is expense of reference

Plaintiff should also mail notice of hearing to all parties and known lienholders.

Prepare affirmation of service

Plaintiff prepares oath of Referee

Sample oath annexed

Parties prepare and submit pre-hearing memoranda

If permitted by Referee

Plaintiff orders court reporter

C. At the Reference

Plaintiff has Referee execute oath of Referee

Introduce oath in evidence

Plaintiff introduces notice of hearing with proof of publication and proof of service

Plaintiff introduces bill for publication of notice of hearing

Plaintiff introduces title and lien search

Plaintiff introduces bill for title and lien search

Plaintiff asks the Referee permission to submit the court reporter bill as an expense of the reference when it is received

If any lienors appear at the reference, the attorneys can object to their liens if there are grounds – i.e. satisfied, barred by statute of limitations, etc.

Attorneys introduce their evidence in support or in opposition to any claims for expenses

Expenses

1. Expenses are usually referred to referee to hear and report.

Morais v Malguarnera 2015 NY Slip Op 31831(U) (Supreme Court Suffolk County 2015). Hon. Thomas F. Whelan. Granted summary judgment to extent referred to referee to hear and report. "Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a co-tenant (*see* *Worthing v Cossar,* 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983])".

Iannucci v Fiorentino, 2015 NY Slip Op 32722(U) Supreme Court Suffolk County 2015). Hon. Thomas F. Whelan. Partial summary judgment granted to extent of appointing a referee to, inter alia, "take proof of the . . . several matters set forth in the pleadings such as, costs of insurance, taxes and other expenses of the subject premises as may have been paid by the parties and their entitlements to an adjustment thereof, if any, and the receipt of income, rents and profits and whether adjustments thereof have been proved, after receipt of the parties' submission of written demands, accounts and proofs of such items and after affording them the right to be heard with respect thereto."

Varriale v D'Amico, 2018 NY Slip Op 30903(U) Supreme Court Suffolk County 2018). Hon. William G. Ford. The referee was ordered to take proof "of the several matters set forth in the

complaint such as, the value of the repairs made thereto, and the insurance, taxes and other expenses of the subject premises as may have been paid by the parties, after affording such parties an opportunity to account for such items, and to report on these matters."

2. **General Rule.** "Absent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property." *Degliuomini v Degliuomini*, 45 AD3d 626 (2nd Dept. 2007).

The Court of Appeals defined implied ouster in *Myers v Bartholomew*, 91 NY2d 630, 633 (1998):

> Although actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants, the common law also recognizes the existence of implied ouster in cases where the acts of the possessing cotenant are so openly hostile that the nonpossessing cotenants can be presumed to know that the property is being adversely possessed against them.

3. **Pre-Hearing/Post-Hearing Memoranda.** Submit pre-hearing memorandum which covers why your client is entitled to recover or other cotenant not entitled to recover reimbursement for repairs, taxes, improvements, insurance, rent, use and occupancy, mortgage payments. This will serve as a guide for you during the hearing. Follow up with post-hearing memorandum if permitted, linking the law to the evidence submitted. Prepare referee's report if possible.

4. **Repairs.** The standard is that there must be proof of the circumstances and need for the restoration work.

In *Worthing v. Cossar*, 93 AD2d 515 (4th Dept. 1983), the defendant claimed that she was entitled to an allowance, in a partition action, for expenditures on home repairs after the commencement of the action. The court discussed the standard in determining whether a tenant in common may be allowed reimbursement for monies expended in repairing and improving the property. The Court stated:

> Generally, a tenant in common may be allowed reimbursement for money expended in repairing and improving the property if the repairs and improvements were made in good faith

> and were necessary to protect or preserve the property (see *Satterlee v. Kobbe*, 173 NY 91; *Cosgriff v. Foss*, 152 NY 104; *Ford V. Knapp*, 102 NY 135, *Vlcek v. Vlcek*, 42 AD2d 308). However, "[t]he mere fact that the defendant * * * has made improvements or repairs upon the property does not in itself necessarily give a right to an equitable allowance" (*Bailey v. Mormino*, 6 AD2d 993). There must be proof of the circumstances and need for the restoration work (see *Johnson v. Depew*, 33 AD2d 645, *supra*).

The cotenant in occupancy is not entitled to repairs and improvements made for his own personal convenience and enjoyment. In *Bailey v. Mormino*, 6 AD2d 933, (4th Dept. 1958), the Court stated:

> The mere fact that the defendant Mormino, one of the tenants in common, has made improvements or repairs upon the property does not in itself necessarily give a right to an equitable allowance. We find no evidence in the record from which it could be determined whether such expenditures were for the purpose of improving and preserving the property or whether they were made for her own personal convenience and enjoyment of the property. We therefore agree that the Official Referee properly disallowed the claim for moneys expended for alleged improvements or repairs. See *Scott v. Guernsey*, 48 N.Y. 106; *Cosgriff v. Foss*, 152 N.Y. 104, 105, 46 N.E. 307, 36 L.P.A. 753; *Ford v. Knapp*, 102 N.Y. 135 6 N.E. 283.

If you are opposing the repair expenses, you could argue the repairs were not made in good faith, they were not necessary, or they were for the occupant's personal convenience and enjoyment.

5. **Taxes.** The rules with respect to taxes are the same as with repairs. "[I]f one cotenant has taken sole possession of the common property without an agreement or arrangement with the other cotenants, he is not in position to seek reimbursement for taxes paid by him; in such a situation he should pay the taxes on the entire property" (24 NY Jur 2d, Cotentency and Partition, Section 76).

In *Van Duzer v. Anderson*, 282 AD 779 (2nd Dept. 1953), aff'd without opinion 306 N.Y. 707 (1954), the Court stated:

> As a tenant in common in possession, it was appellant's duty to pay the taxes. *Stevens v. Melcher*, 152 N.Y. 551, 565, 46 N.E. 965, 967.

In *Worthing v. Cossar,* 93 AD2d 515 (4th Dept. 1983), the court in a partition action found that while ordinarily a tenant in common is entitled to reimbursement for the share of the taxes paid by him for the benefit of his cotenants, such reimbursement is properly refused where the tenant's occupancy is exclusive and the cotenant is effectively ousted.

In *Yancey v. Yancey*, 52 AD2d 603 (2nd Dept. 1976), the defendant was in sole possession of the premises up to the time of a divorce. The plaintiff sought a credit as to the reasonable rental value of the defendant's occupancy. On appeal, the court held that the court properly applied the plaintiff's credit for the reasonable value of the defendant's use and occupancy to offset the defendant's credit for expenses incurred in maintaining the property.

6. Improvements. The cotentant is not chargeable with an improvement unless he consented to such improvement. This is explained in 24 NY Jur 2d, Cotenancy and Partition, Section 71 as follows:

> In general, one cotenant is not chargeable for the expense of a permanent improvement erected upon the premises by the other cotenant, although with the knowledge of the former, unless he agreed to the making of the improvement. One cotenant in sole possession who makes improvements without obtaining the consent of his co-owners is deemed at law to make them for the benefit of his occupancy, not for the benefit of all the cotenants, and is not entitled to reimbursement from the latter, even though the improvements do enhance the value of the freehold and were made with knowledge of the other cotenants.
>
> It seems clear that a cotenant making an improvement as distinguished from a repair is not entitled to a lien or charge upon the interest of another cotenant which shall be good against an encumbrance upon such interest, unless there was an arrangement or agreement for the improvement.

In *Cosgriff v. Foss*, 152 NY 104 (1897), a tenant in common, who was also a lessee of his cotenant, made

improvements on the property in the course of his tenancy which enhanced its value and were made with the knowledge but without the consent of the cotenant. Such improvements were not to protect or to preserve the property but to aid the tenant in carrying on a business then prosecuted by him on the premises. The Court of Appeals reviewed the common law rule which prevented a cotenant to recover for improvements as distinguished from ordinary repairs. The court noted that courts of equity could extend the rule to improvements in special cases but that this rule would be carefully limited to those cases where special circumstances gave rise to strong equitable rights. In *Cosgriff*, the court did not permit recovery for improvements noting that such rule could permit one cotenant to run the other in debt against his will for unnecessary improvements.

7. **Insurance.** Look to see if the insurance covered the interest of only one of the cotenants.

8. **Rent.** *Russo Realty Corp. v Orlando,* 2008 NY Slip Op 30069(U) (Supreme Court Suffolk County 2007). Hon. Paul J. Baisley. Cotenant failed to properly account for her rent receipts despite demands from plaintiff and court orders. Imputed rent awarded to plaintiff.

9. **Use and Occupancy.** *Klein v Dooley*, 2010 NY Slip Op 33142(U) (Supreme Court Suffolk County 2010). Hon. Arthur G. Pitts. "It is well settled that a tenant in common is not liable to a cotenant for use and occupancy absent an agreement to that effect or an ouster (*see* *Misk v Moss,* 41 AD3d 672, 839 NYS2d 143 [2007]; *Degliuomini v Degliuomini,* 12 AD3d 634, 785 NYS2d 519 [2004]; *Corsa v Biernacki,* 2 AD3d 388, 767 NYS2d 855 [2003]). Exclusive possession by a cotenant, alone, is not the equivalent of an ouster (*see,* *Gonzalez v Gonzalez,* 236 AD2d 589,653 NYS2d 700 [1997]; *Perez v Perez,* 228 AD2d 161, 644 NYS2d 168 [996], *Iv to appeal dismissed* 89 NY2d 917, 653 NYS2d 920 [1996])."

The argument to be made is that if the cotenant is in exclusive possession, that cotenant should be liable for the carrying expenses including mortgage payments – that the value of the cotenant's use and occupancy should offset any expenses paid.

10. **Statute of Limitations.** Look to see if the expenses for which reimbursement is sought are old. 23 NY Jur 2d, Contribution, Indemnity and Subrogation, §22 states:

> Because the common-law right to contribution is ordinarily considered to be based on an implied contract, the six-year statute of limitations has been regarded as applicable to an action to enforce such right. In a simple action for contribution, the statute of limitations begins to run against the claim of the party entitled thereto at, and not until, the time when the event occurs which throws an inequitable share of the common burden or obligation on him or her, which is usually the time when payment, discharge, or satisfaction, in whole or in part, of such obligation is made.

11. **Equity.** Since partition is equitable in nature, depending on the circumstances, the cotenant may be required to pay its share of the mortgage, taxes, major repairs, improvements dating back more than thirty years. See *Berlin v Wojnarowski,* 32 AD3d 810 (2nd Dept. 2006):

> A partition action, although statutory, is equitable in nature and the court could compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale" (*Cook v Petito,* 208 AD2d 886 [1994] [citation and internal quotation marks omitted]). The plaintiff should be required to compensate the appellant for his equitable share of the mortgage and taxes on, and major repairs and improvements to, the subject premises, from March 9, 1971 to the date the property is sold. Accordingly, we remit the matter to the Supreme Court, Suffolk County, for a determination of the foregoing issues, in accordance with a consideration of equitable principles, including the value of the appellant's life estate.

D. After the Reference

Prepare and submit post-hearing memoranda if permitted

Prepare and submit proposed Referee's Report to Referee

File executed Referee's Report

RPAPL §915 Interlocutory Judgment. The interlocutory judgment shall determine the right, share or interest of each party in the property, as far as the same has been ascertained. Where the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, shall direct that the property or the part so circumstanced be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff shall direct that partition be made between the parties according to their respective rights, shares and interests and shall designate three reputable and disinterested freeholders as commissioners to make the partition so directed.

Once Referee's Report is filed, make motion to affirm or disaffirm Referee's Report

Sample notice of motion, affirmation in support and interlocutory judgment annexed

Materials:

- Motion for referee
- Notice of Hearing
- Oath of Referee
- Motion for interlocutory judgment
- Sample defenses annexed.

Bio – Paula J. Warmuth
Bio – Richard A. Kaufman

Richard J. Kaufman, Esq.

EXPERIENCE

8/19 to present — Richard J. Kaufman, P.C
General Practice of Law - 646 Main Street
Port Jefferson, NY
(Practice below converted to professional corporation)

3/88 to 8/19 — General Practice of Law – 646 Main Street
Port Jefferson, NY
Special Areas of Practice:

- Personal injury/wrongful death litigation
- Criminal and complex civil litigation
- Surrogate's litigation
- Real estate (commercial & residential)
- Commercial contracts/Bank closings
- Estates and wills
- Bankruptcy

Regional practice having represented over the years major L.I. sanitation, construction, sand mining and real estate companies as corporate and outside counsel and various professional practices in both transactional/ contract and litigation matters. Criminal experience range from traffic violations to murder trials, white collar & several nationally renowned matters. Appeals to Second Department.

2/83 - 3/88 — Confidential Law Secretary to State Supreme Court Justice
Riverhead, New York (Justice Melvyn Tanenbaum)
Drafting civil practice opinions with some published in Official New York Miscellaneous Reports; settlement conferencing of all pre-trial cases & supervision of court personnel

6/82 - 2/83 — Parola, Feuerstein & Gross - Wantagh, New York
Associate attorney in general practice firm

5/78 - 6/82 — Suffolk County District Attorney - Riverhead, New York
Senior Assistant District Attorney.
Prosecution by trial of felony matters.

12/76 - 4/78 — Massachusetts Defenders Committee - Cambridge, Mass.
Trial Attorney- Criminal defense (felony bureau)

LICENSES & EDUCATION	Admitted to practice: New York - 1978 Massachusetts - 1977 U.S. District Court, E.D.N.Y. - 1982 Education: J.D. - Boston University 1976 B.A. - Hofstra University (magna cum laude) 1973
PROFESSIONAL ORGANIZATIONS	New York State Bar Association Suffolk County Bar Association - Judicial Screening Committee - Grievance Committee Suffolk Academy of Law Suffolk Criminal Bar Association (President 2003-04)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

NOTICE OF MOTION

- against -

Index No. 123456/2021

JOHN W. DOE, Jr. and the ABC BANK,

Defendant(s).

----------X

PLEASE TAKE NOTICE that upon the affirmation of Richard J. Kaufman, affirmed on the 1st day of November, 2021, the affidavit of JANE M. DOE sworn to on the 1st day of November, 2021, and the exhibits attached hereto, plaintiff JANE M. DOE will move this Court at the Courthouse located at 1 Court Street, Riverhead, New York 11901, on December 1, 2021 at 9:30 a.m. or as soon thereafter as counsel may be heard for an order:

1) Pursuant to CPLR §3215 granting summary judgment in favor of plaintiff and against defendant JOHN W. DOE directing partition and sale of the residential property known as 510 Breakwater Road, Mattituck, County of Suffolk, State of New York (Dist 1000 Sect 106.00 Block 09.00 Lot 007.009);

2) Pursuant to CPLR §3212 granting summary judgment in favor of plaintiff and against defendant ABC BANK directing partition and sale of the residential property known as 510 Breakwater Road, Mattituck, County of Suffolk, State of New York (Dist 1000 Sect 106.00 Block 09.00 Lot 007.009);

3) appointing a Referee to ascertain the rights, shares and interests of the several parties in the partitioned property to be sold at auction and otherwise in furtherance of the foregoing relief and to determine whether the premises can be sold in parcels; and

granting such other and further relief as demanded in the Verified Complaint in this action and as the Court may otherwise deem just and proper.

Pursuant to CPLR 2214(b), answering affidavits, if any are required to be served upon the undersigned at least seven days before the return date of this motion.

Dated: Port Jefferson, NY
November 1, 2021

_____

RICHARD J. KAUFMAN
Attorney for Plaintiff JANE M. DOE
646 Main Street
Port Jefferson, NY 11777
(631) 331-0950

To: Mullen & Iannaraone, P.C.
Attorneys for Defendant ABC BANK
300 East Main Street, Suite 3
Smithtown, NY 11787

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

- against -

JOHN W. DOE and the ABC BANK,

Defendant(s).

----------X

AFFIRMATION

Index No. 123456/2021

RICHARD J. KAUFMAN, being duly admitted to practice law in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. I am the attorney for the plaintiff JANE M. DOE in the above-entitled action and as such I am fully familiar with the facts and circumstances hereof. I submit this Affirmation in support of the within motion for an Order 1) pursuant to CPLR §3215 granting a default judgment against defendant JOHN W. DOE, and 2) pursuant to CPLR §3212 for summary judgment against defendant ABC BANK, as to their respective interests directing partition of the subject premises pursuant to RPAPL §§ 911 and 913, and referring determination of said respective interests to a referee appointed by the Court.

PROCEDURAL STATUS
AND AFFIRMATION OF REGULARITY

2. This action for partition was commenced by the filing of the Summons and Verified Complaint with exhibit(s) on April 14, 2017 (copies collectively annexed hereto as Exhibit "1", *see* NYSCEF No. 1). Issue was joined by defendant ABC BANK ("defendant BANK") by service of a Verified Answer by its counsel, Mullen & Iannarone, P.C. on on June 6, 2017 (copy annexed hereto as Exhibit "2", *see* NYSCEF No. 4). In addition, said defendant, through the BANK's Attorney's Office, also filed a "Notice of Appearance, Waiver, and Conditional Assertion of Claim

to Surplus Monies" dated June 19, 2017, which provided for waiver of service of the instant application (a copy of said Notice is annexed hereto as Exhibit "3", *see* NYSCEF No. 6).

3. Personal service upon defendant JOHN W. DOE ("defendant JWD") was completed on the 8th day of May, 2017 by filing of the affidavit of service with the Court on said date (a copy of said affidavit is annexed hereto as Exhibit "4", *see* NYSCEF No. 3).

4. The time for defendant JWD to answer or move with respect to the complaint has expired, and said defendant has not answered or moved with respect to the complaint. Said defendant's time to plead has not been extended, and he is now in default in pleading.

PARTITION OF THE PREMISES

5. This is a partition action involving premises located at 510 Breakwater Road, Mattituck, County of Suffolk, State of New York and is known as Tax Map No. 1000/106.00/ 09.00 /007.009 ("the Premises"). A copy of the last filed deed is annexed hereto as Exhibit "5".

6. As more fully described in the affidavit of plaintiff JANE M. DOE, the Premises was conveyed to plaintiff and her then-husband, defendant JWD in 1995, at which time they took out a purchase money mortgage subsidized by the Farmer's Home Administration through the lender Amerifirst Mortgage Corp. They subsequently divorced and there has been no change in the status of the ownership or the deed, although as the parties are no longer married, they are now deemed to be tenants-in-common as a matter of law.

7. Although defendant JWD was permitted to occupy the Premises subsequent to the divorce, he has permitted the mortgage to fall into default, thus jeopardizing what is believed to be more than $50,000 in equity. As a result, notification has been given by defendant BANK that it intends to commence foreclosure proceedings.

8. Despite plaintiff's demands for defendant JWD to cooperate in a sale of the Premises or otherwise satisfy *her* financial obligation to defendant BANK, he has persistently refused to do so and apparently is incapable of doing do anytime in the future.

MOTION FOR DEFAULT JUDGMENT

9. In view of the above and based upon the specific allegations of fact contained in plaintiff's affidavit and the Verified Complaint, plaintiff has demonstrated her entitlement to a default judgment as against defendant JWD. As stated in *Donlon v. Diamico*, 33 A.D.3d 841, 823 N.Y.S.2d 483 (2nd Dept., 2006):

> " A person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners" (RPAPL 901[1]; *see* A.D. 2d 535, 536, 699 N.Y.S.2d 103; *Ferguson v. McLoughlin,* 184 A.D.2d 294, 295, 584 N.Y.S.2d 816; *Bufogle v. Greek,* 152 A.D.2d 527, 528, 543 N.Y.S.2d 152)."

10. Moreover, plaintiff has demonstrated that defendant JWD is in default in that he was properly served with the summons and complaint and has otherwise failed to appear, answer or move within the statutory period within which to do so.

11. Accordingly, it is respectfully submitted that a default judgment should be granted in favor of plaintiff for the relief demanded in the Complaint.

MOTION FOR SUMMARY JUDGMENT

12. With regard to the answering defendant, defendant BANK, it is respectfully submitted that said defendant's only interest is in the actual proceeds of any Court-ordered sale of the Premises. Moreover, without wishing to be presumptuous, it may well be to the defendant's advantage not to have to institute its own separate and far more complicated foreclosure proceedings in order to achieve the same end while in the meantime the value of its collateral diminishes.

13. It appears from the nature of its Answer's sole affirmative defense that there is no question of fact raised which needs to be determined and that said defendant seeks only "all proceeds necessary to satisfy the obligations set forth in the mortgage dated February 14, 1995", a concern which would necessarily be addressed and met by the grant of summary judgment as requested.

14. Accordingly, it is respectfully submitted that the plaintiff is entitled to summary judgment with respect to the interest of defendant BANK.

15. No previous application for the relief sought herein has been made.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff JANE M. DOE granting partition of the premises located at 510 Breakwater Road, Mattituck, County of Suffolk, State of New York and related relief as demanded in the complaint, together with interest and costs, and such other and further relief as this Court may deem just and equitable.

Dated: Port Jefferson, NY
November 4, 2021

_____
RICHARD J. KAUFMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

AFFIDAVIT

- against -

Index No. 123456/2021

JOHN W. DOE and the ABC BANK,

Defendant(s).

----------X

STATE OF NEW YORK)
) ss.
COUNTY OF SUFFOLK)

JANE M. DOE, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action and I make this affidavit in support of my application for judgment by default pursuant to CPLR §3215.

2. I respectfully request that the allegations contained in the Verified Complaint verified by me together with the exhibits thereto, be incorporated in full with the same force and effect as if set forth herein (a copy of said complaint, NYSCEF No. 1, is annexed hereto as Exhibit "1"). Further, I have reviewed the affirmation of my attorney Richard J. Kaufman, dated September, 2017 and state that the contents of said affirmation are true to the best of my information and belief and further adopt the statements in said affirmation as if set forth herein.

3. The above-entitled action was brought by plaintiff against the defendant for partition and sale of real property pursuant to RPAPL Article 9 and for other related relief. In essence this is a claim whereby plaintiff and defendant are each owners of fifty (50%) percent

interest in the premises in issue. Said real property is known as 510 Breakwater Road, Mattituck, County of Suffolk, State of New York and is identified as having Tax Map No. 1000/106.00/ 09.00/007.009, and as being more fully described in the Verified Complaint ("the Premises").

4. Said property was conveyed to myself and my ex-husband, JOHN W. DOE, Jr. ("defendant JWD") by deed dated February 14, 1995 and recorded in the Office of the Suffolk County Clerk on February 14, 1995 at Liber 11714 page 583 (a copy of said deed is annexed hereto as Exhibit "5"). Since that time, by Judgement of this Court (Loguercio, J.) entered September 28, 2016, we have divorced and there has been no change in the status of the deed itself.

5. By reason of the foregoing, the plaintiff and defendant JWD each have a one-half interest as tenants in common in said property.

6. In addition, on or about February 14, 1995 at the time of acquiring the Premises, a purchase money mortgage was given to defendant ABC BANK, acting through the Amerifirst Mortgage Corp. to secure the payment of the sum of $121,500.00, ("the Mortgage") which said Mortgage was recorded on February 14, 115 in the Office of Register of Suffolk County, in liber 18914, page 555, and which said Mortgage is a lien upon said interests of plaintiff and defendant JWD in said property.

7. As a result defendant ABC BANK ("defendant BANK") has been named as a necessary party to this action.

8. Defendant JWD and myself remain jointly and severally liable to defendant BANK upon the obligations of the Mortgage and the note secured thereby.

9. I have been notified by defendant BANK that the Mortgage and the note secured thereby are presently in default and continue to accrue interest together with all accumulated interest which had otherwise been subsidized since commencement of the

obligation pursuant to the terms of the Mortgage. That mortgage provided provided, *inter alia,* for repayment of all subsidized interest under the federal program which issued the Mortgage. I have been advised that defendant BANK intends to commence foreclosure proceedings.

10. Of even more urgency is the practical one which is the fact that at present there appears to be substantial equity - perhaps as much as $50,000 over what may be owed on the mortgage and expenses of sale-- which may otherwise be preserved to the parties but will shortly be extinguished in the event said default of the Mortgage continues, a circumstance that could be avoided but for defendant JWD's failure to cooperate in the sale of the Premises.

11. By agreement between myself and my ex-husband, he agreed to obtain refinancing of the mortgage in his own name or to cooperate in the sale of the Premises in order to satisfy or otherwise supersede plaintiff's obligation under the Mortgage and the note secured thereby.

12. Despite my demands for him to do so, defendant JWD has not only failed to re-finance the Mortgage or cooperate in a sale of the Premises but he is financially utterly incapable of re-financing the mortgage and there is no remote prospect that his financial condition shall change at any time in the future as to allow him to do so.

13. I have been and remain desirous of satisfying my obligation under the note and Mortgage and is otherwise desirous of selling my interest in the premises to do so.

14. The Premises are so situated that a division or partition thereof among the parties entitled thereto according to their respective rights and interests, cannot be made without prejudice to the owners thereof.

15. No other lands other than the aforesaid property are owned either in common or as joint tenants by defendant JWD and myself in this state or any other state.

16. No request for the relief herein has previously been made.

WHEREFORE, the plaintiff demands judgment as follows:

1. Declaring that plaintiff JANE M. DOE and defendant JOHN W. DOE, Jr. are presently seized and possessed as tenants in common each with a one-half interest in said premises;

2. Declaring that the said Premises are so situated that a sale thereof is necessary, and directing that said Premises be sold by and under the direction of the Court and conveyance given to the purchaser and that from the proceeds of after the costs and disbursements of this action, the sale the interest of defendant ABC BANK be satisfied;

3. Directing an accounting of all funds, rents and or other benefits received by defendant JOHN W. DOE, Jr. or otherwise paid out in connection with her maintenance and control of the Premises and that the residue of the money arising from said sale after satisfying the interest of defendant ABC BANK, be otherwise divided and paid amount the said parties according to their respective rights and interest as aforesaid; and

4. For such other and further relief as may be just and proper.

_____
JANE M. DOE

Sworn to before me this
1st day of September, 2017

_____
NOTARY PUBLIC

At an I.A.S. Term, Part 30 of the Supreme Court, State of New York, County of Suffolk, at the Courthouse thereof located at One Court Street, Riverhead, NY on the _____day of_____, 2021

P R E S E N T:

HON. DAVID T. REILLY, J.S.C.

----------X

JANE M. DOE,

Plaintiff,

ORDER

- against -

Index No. 123456/2021

JOHN W. DOE and the ABC BANK,

Defendant(s).

----------X

UPON reading and filing of the Notice of Motion of plaintiff JANE M. DOE dated November 1, 2021, for an order, *inter alia*, pursuant to CPLR §§ 3215 and 3212 and RPAPL Article 9 granting, respectively, a default judgment against defendant JOHN W. DOE, Jr. and summary judgment against defendant ABC BANK, and upon said defendant JOHN W. DOE's failure to timely appear in this action or answer the complaint, and upon Verified Answer filed June 6, 2017 by said defendant ABC BANK and upon said defendant ABC BANK's failure to raise any triable issue of fact, and upon all the exhibits annexed to said motion and all the proceedings in this action heretofore,

NOW, upon application of RICHARD J. KAUFMAN, ESQ., attorney for plaintiff JANE M. DOE, it is hereby

ORDERED that plaintiff JANE M. DOE's motion for a default judgment against defendant JOHN W. DOE and for summary judgment against defendant ABC BANK, each

seeking partition of certain property located at 510 Breakwater Road, Mattituck, New York is granted to the extent that _____ with offices located at _____ is appointed Referee in this action to ascertain and report the rights, shares and interests of the parties in the property described in the complaint and of which a partition is sought (*see* RPAPL §911); to secure an abstract of the conveyances by which said property is held; to ascertain the amount due for principal, interest and other disbursements under the terms of the mortgage on the property; to take account of the rents received and expenses borne by the respective parties and to report on these matters; and to report whether the property or any part thereof is so circumstanced that a partition of the property can not be made without great prejudice to the owners; and to take testimony on such matters, if necessary; and it is further

ORDERED that by accepting this appointment, the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) including, but not limited to section 36.2(c) ("Disqualification from appointment") and section 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDER that the Referee shall be paid a fee in the amount of _____ in the discretion of the Court, and all costs and disbursements to be incurred in the execution of his/her responsibilities shall be paid by plaintiff, who shall be given due credit and allowance for said amounts upon resolution of this proceeding.

Dated: _____

E N T E R

_____

Hon. DAVID T. REILLY, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. NELSON,

Plaintiff,

NOTICE OF MOTION

- against -

Index No. 123456/2021

JANE M. NELSON and ABC BANK,

Defendant.

----------X

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Richard J. Kaufman, attorney for plaintiff JANE M. NELSON affirmed on **********, the Verified Complaint of plaintiff JANE M. NELSON, sworn to on **********, the Report of Lawrence W. Cregan, Referee, dated **********, the testimony and exhibits received by the Referee herein pursuant to the order of reference of this court (Reilly, J.) dated June 29, 2018, and upon all the papers and proceedings heretofore filed in this action, the undersigned will move this court, at IAS Term Part 30 thereof before Justice David T. Reilly at the Supreme Court Courthouse located at One Court Street, Riverhead, New York, at 9:30 a.m. on **********, for an order pursuant to CPLR §4403 confirming in its entirety the Report of Lawrence W. Cregan, Esq., Referee, directing an interlocutory judgment be made and entered directing that the premises described in the complaint be sold pursuant to the Report, directing attorneys fees on behalf of the plaintiff and granting such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits and papers, if any, in opposition to this motion are required to be served upon the undersigned at least seven (7) days before the return date of this motion pursuant to CPLR §2214(b).

Dated: Port Jefferson, NY
****

Respectfully submitted,

_____

RICHARD J. KAUFMAN, P.C.
By: Richard J. Kaufman, Esq.
Attorney for Plaintiff
646 Main Street
Port Jefferson, NY 11777
(631) 331-0950

TO:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

- against -

JOHN W. DOE, Jr. and the ABC BANK,

Defendant.

----------X

AFFIRMATION IN SUPPORT OF MOTION TO CONFIRM REFEREE'S REPORT

Index No. 123456/2021

RICHARD J. KAUFMAN, being an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under the penalties of perjury:

1. I am an attorney with the firm of Richard J. Kaufman, P.C., attorney for plaintiff JANE M. DOE. I am familiar with the facts and circumstances set forth in this affirmation and submit this Affirmation in support of the within motion for an order pursuant to CPLR §4403 confirming in its entirety the Report of Lawrence W. Cregan, Esq., Referee dated January 13, 2019; directing an interlocutory judgment be made and entered directing that the premises described in the complaint be sold pursuant to the Report; directing attorneys fees on behalf of the plaintiff; and granting such other and further relief as this Court deems just and proper.

2. This is a partition action involving premises located at 510 Breakwater Road, Mattituck, County of Suffolk, State of New York and is known as Tax Map No. 1000/106.00/ 09.00 /007.009 ("the Premises").

3. On June 29, 2018 an order was made and entered in this action pursuant to CPLR §§ 3215 and 3212 and Article 9 of the RPAPL granting plaintiff JANE M. DOE's motions for a default judgment against defendant JOHN W. DOE and for summary judgment against

defendant ABC BANK OF AMERICA, respectively, seeking partition of the Premises and, referring the matter to Lawrence W. Cregan, Esq. as Referee to, *inter alia*, hear and ascertain the rights, shares and interests of the parties in the Premises and to thereupon report said findings to the Court (a copy of said Order (Reilly, J.) dated June 29, 2018 is annexed hereto as Exhibit "A").

4. Pursuant to said Order to take proof and proper notice to all parties, hearings were held in which testimony was taken and exhibits submitted before Lawrence W. Cregan, Esq. as Referee, who, on January 13, 2019 made and filed his Referee's Oath and Report in the Office of the Clerk of the County of Suffolk, in which the Referee reported that the material allegations of the complaint are true, and in which the referee ascertained the interests of the parties, and reported that actual partition of the Premises cannot be made without great prejudice to the interests of the parties (a copy of said Report together with the Referee's letter notification to the Court dated January 17, 2019 is annexed hereto as Exhibit "B").

5. Except for the firm of Smith and Jones having substituted as the attorney of record for defendant ABC BANK OF AMERICA, there has been no change in parties or attorneys or interests of the parties since the making of, and as determined by, said Report of the Referee.

6. I have been informed by, and attested to in the complaint verified by, plaintiff JANE M. DOE that the Premises are the only real property in this State owned by the parties as tenants in common.

WHEREFORE, it is respectfully requested that an order be made confirming the Report and that an interlocutory judgment be made and entered directing that the Premises described in the complaint be sold pursuant to the report.

Dated: Port Jefferson, NY
****

_____
RICHARD J. KAUFMAN

At an IAS Term, Part 30 of the State of New York, County of Suffolk, at the Courthouse thereof located at One Court Street, Riverhead, NY on the _____day of_____, 2019

P R E S E N T:

HON._____
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

INTERLOCUTORY JUDGMENT

- against -

JOHN W. DOE and the ABC BANK,

Index No. 123456/2021

Defendant.

----------X

The Court having previously considered the pleadings, affidavits of proof and exhibits upon the motion by plaintiff JANE M. DOE and having rendered judgment thereon in favor of plaintiff JANE M. DOE pursuant to CPLR §3215 against defendant JOHN W. DOE and pursuant to CPLR §3212 against defendant ABC BANK (hereinafter the "BANK"), respectively, by order of this Court (Reilly, J.) dated **********, and this matter having been referred to Lawrence W. Cregan, Esq. as Referee to, *inter alia*, hear and ascertain the rights, shares and interests of the parties in the Premises and to thereupon report said findings to the Court, and pursuant to said order proper notice was issued and hearings held wherein testimony was taken and exhibits submitted before said referee, who, on January 13, 2019

made and filed his Referee's Oath and Report in the Office of the Clerk of the County of Suffolk, in which the Referee reported that the material allegations of the complaint are true, and in which the referee ascertained the interests of the parties, and reported that actual partition of the Premises cannot be made without great prejudice to the interests of the parties;

NOW upon all of the proceedings had to date in this matter, and upon the present motion by plaintiff JANE M. DOE for an order pursuant to CPLR §4403 confirming in its entirety the Report of Lawrence W. Cregan, Esq., Referee, filed with the Clerk of the Court on **********; directing an interlocutory judgment be made and entered directing that the premises described in the complaint be sold pursuant to the Report, directing attorneys fees on behalf of the plaintiff and granting such other and further relief as this Court deems just and proper; it is hereby

ORDERED AND ADJUDGED that the report of Lawrence w. Cregan, Referee is hereby confirmed in all respects; and it is further

ORDERED AND ADJUDGED that plaintiff and defendant JOHN W. DOE are the owners of and entitled to, as tenants in common, the following real property identified as having tax map number 1000/106.00/09.00/007.009, and is otherwise known as 510 Breakwater Road, Mattituck, in the Town of Southold, County of Suffolk, State of New York, and being more fully described as follows:

> "ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon, erected, situate, lying and being in the Town of Southold, County of Suffolk and State of New York and described as follows:
>
> BEGINNING at a point marked by a monument on the easterly side of Luther's Road, at the point where the northerly line of land now or formerly of Versal Holding Corp., formerly Xesia Ashley, intersects said easterly side of Luther's Road and which point of beginning is distant, as measured on a course north 7° 54' 30" west, 405.77 feet from the corner formed by the intersection of the westerly side of Luther's Road and the northerly side of Mill Road:

RUNNING THENCE North 26° 01' 00" west along the easterly side of Luther's Road 193.26 feet to the southerly line of Parcel II herein;

RUNNING THENCE south 86° 04' 00" east along the southerly line of Parcel II 264.44 feet to the westerly line of land now or formerly of Versal Holding Corp.;

RUNNING THENCE southerly and westerly along the westerly and northerly lines of land now or formerly of Versal Holding Corp. the following two (2) courses and distances:

1) South 0° 29' 00" east 200.00 feet;
2) North 76°11" 00" west 186.13 feet to the easterly side of Luther's Road the point or place of BEGINNING.

and it is further

ORDERED AND ADJUDGED that the respective rights, shares and interests of the parties to this action in the property described above, as ascertained and established by the report of the referee are as follows:

(a) Plaintiff JANE M. DOE and defendant JOHN W. DOE are tenants in common each being entitled to a one-half interest in the subject premises and that no persons other than those named in this order have an estate in the property and that the property described above is the only real property which the parties to this action own in the State of New York;

(b) Defendant ABC BANK holds a mortgage lien on the subject premises as mortgagee which mortgage lien was recorded in the Office of the Clerk of Suffolk County, New York in Liber of Mortgages 18914 at page 555, the balance of which lien as of September 18, 2018 is $309,376.95, which such mortgage lien amount as then due and owing on the date of closing shall be paid equally by plaintiff JANE M. DOE and defendant JOHN W. DOE;

(c) As of the date of the report there are four (4) judgment liens filed against the interest of defendant JOHN W. DOE and one (1) judgment lien filed against the interest of plaintiff JANE M. DOE filed in the Office of the Clerk of the County of Suffolk;

and it is further

ORDERED AND ADJUDGED that the property described above is so circumscribed that an actual partition of the property among the parties entitled to the property, according to their respective rights and interests cannot be made without great prejudice to the parties and that the property be sold as provided below; and it is further

ORDERED AND ADJUDGED that the property with buildings and improvements be offered and sold as one parcel at public auction by or under the direction of _____ residing at/with offices located at _____ who is hereby appointed referee for that purpose and that any of the parties to this action may purchase at the sale; and it is further

ORDERED AND ADJUDGED that the sale shall be for cash, payable ten (10%) per cent at the time of sale which shall be deposited in a non-interest bearing escrow account pending closing of title and the balance on delivery of the referee's deed; that the referee may allow any purchaser to have as much as thirty (30) day to complete the payment of the purchase money and may allow any purchaser such reasonable adjournment of closing of title on such terms as to the referee may seem justified; that if any purchaser shall fail to complete the purchase at the time set by the terms of the sale or by such later date set by the referee, the referee shall resell the premises and the defaulting purchaser shall be liable for all expenses of advertisement of the resale and other expenses of the sale and for any deficiency; and it is further

ORDERED AND ADJUDGED that the referee shall give notice of the sale of the premises in accordance with RPAPL §231, which notice shall set the time and place of the sale, that the premises shall be sold subject to any state of facts that an accurate survey would show; that each purchaser shall pay the charge for stamps upon the deed to be given to the

purchaser by the referee and the reasonable charge of the referee for drawing the deed; and that the notice of sale may contain any other statement that the referee shall deem it advisable to make; and it is further

ORDERED AND ADJUDGED that immediately upon completion of the sale, the referee shall file with the Clerk of this court his/her report, under oath, containing a description of the premises sold, the name of the pruchasre and the price at which is tis sold, and shall deposit any money received by him/her in the _____Bank subject to further order of this Court; and it is further

ORDERED AND ADJUDGED that any party to this action and the referee may apply to the Court for further directions.

Dated: _____

E N T E R

_____
Hon. DAVID T. REILLY, J.S.C.

At at trial term of the Supreme Court of New York, held in and for the County of Suffolk at the Courthouse located at One Court Street, Riverhead, NY 11901 on the _____day of _____, 2021

PRESENT: HON. DAVID T. REILLY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

ORDER

-against-

JOHN W. DOE, UNITED STATES OF AMERICA, Acting through the Farmers Home Administration,

Index No. 606973/2017

Defendant(s)

----------X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Richard J. Kaufman, Esq., affirmed on July 19, 2021, the Second Amended Interlocutory Judgment entered of this Court (Reilly, J.) entered on September 1, 2020, and the exhibits annexed hereto and upon all of the pleadings and proceedings had heretofore herein,

LET the defendant, JOHN W. DOE show cause at a Trial Term Part _____ of this Court to be held at the Courthouse located at One Court Street, Riverhead, NY 11901 on the _____ _____ day of _____, 2021 at 9:30 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, why an injunction should not be issued herein pursuant to CPLR 6301 restraining and enjoining defendant JOHN W. DOE from transferring any right, title or interest which he may possess in the premises located at 510 Breakwater Road, Mattituck, County

of Suffolk, State of New York to a third party without approval of this Court during the pendency of the instant action; and such other and further relief as the Court may deem just and proper; and it is

ORDERED, that pending the hearing and determination of this motion defendant JOHN W. DOE is restrained and enjoined from transferring, selling, pledging, assigning or otherwise disposing or permitting become subject to a security interest or lien the aforesaid premises located 510 Breakwater Road, Mattituck, NY designated as District 1000, Section 106.00 Block 09.00 Lot 007.009 until further order of this Court, and it is further

ORDERED, that the Clerk of Suffolk County shall record this temporary restraining order in the indices and records of District 1000, Section 106.00 Block 00.00 Lot 000.000 of the aforesaid property 510 Breakwater Road, Mattituck, NY.

SUFFICIENT REASON APPEARING THEREFORE, let service of a copy of this Order together with the papers upon which it was granted, upon defendant JOHN W. DOE at 123 Main Street, Southold, NY by U.S.P.S. Express Mail (2 day) and e-mail, or by personal delivery on or before the _____day of _____, 2021 be deemed good and sufficient service.

E N T E R,

_____

J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE M. DOE,

Plaintiff,

-against-

JOHN W. DOE and ABC BANK,

Defendant(s)

----------X

AFFIRMATION

Index No. 12345/2017

RICHARD J. KAUFMAN, being an attorney duly admitted to the practice of law before all of the Courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am counsel with the Law Offices of Richard J. Kaufman, P.C., attorney for plaintiff JANE M DOE ("JMD"). This affirmation is submitted in support of the instant order to show cause for an injunction pursuant to CPLR 6301 and based upon personal knowledge except where stated to be upon information and belief or is otherwise apparent.

2. This is an action for partition of the property located 123 Main Street, Town of Southold, County of Suffolk, State of New York, known by Tax Designation District 1000, Section 106.00 Block 00.00 Lot 000.000 ("the Premises"). A copy of the Summons and Complaint (NYSECF No.1) and the Verified Answer of defendant ABC BANK (NYSECF No.4) re collectively annexed hereto as **Exhibit "A"**. Defendant JWD defaulted in answering the complaint.

3. On September 1, 2020 a Second Amended Interlocutory Judgment ("the Judgment") was granted by this Court (Reilly, J.) appointing John Smith, Esq. as Receiver and

directing the partition and sale of the Premises (a copy of the Judgment is annexed hereto as **Exhibit "B"**).

4. Pursuant to said Judgment plaintiff scheduled an auction sale to take place on November 12, 2020 at Southold Town Hall (a copy of the Notice of Sale is annexed hereto as **Exhibit "C"**).

5. Three 3 days immediately prior to the auction sale date, defendant JWD filed for Chapter 13 bankruptcy relief in U.S. Bankruptcy Court, Eastern District of New York, Case No. 8-20-12345.

6. As a result of the automatic stay resulting from the bankruptcy filing, the auction sale was cancelled by the Referee John Smith, Esq. at the last minute.

7. The bankruptcy petition was filed *pro se* by said defendant, was hand-written and contained none of the necessary schedules of financial and other information statutorily required for a proper petition to be considered.

8. Due to its patent deficiencies, and despite several explicit notifications by the Bankruptcy Court to correct them, said defendant failed make any attempt whatsoever to do so nor did he even appear at the Meeting of the Creditors (the so-called 341 Meeting) before the assigned Trustee, Michael Macco, Esq.

9. As a result of these deficiencies and default the bankruptcy petition was dismissed by the Bankruptcy Court (a copy of the order and the docket of Case 8-20-12345 are collectively annexed hereto as **Exhibit "D"**).

10. Upon dismissal of said petition, plaintiff arranged and paid for advertisement of the auction sale pursuant to the Judgment for a second time, this time to take place on June 10, 2021 (a copy of the Notice of Sale is annexed hereto as **Exhibit "E"**).

11. On the very eve of the auction sale, the day immediately prior to the date it was to occur, defendant JWD again filed for Chapter 13 bankruptcy relief in U.S. Bankruptcy Court, Eastern District of New York, Case No. 8-21-67890.

12. Again, as a result of the automatic stay the auction sale was cancelled by the Receiver Lawrence Cregan, Esq. at the last minute.

13. Again, the bankruptcy petition was filed *pro se* by said defendant, was hand-written and contained none of the necessary schedules of financial and other information. In fact, in that portion of the petition where defendant was asked whether he had previously filed for bankruptcy within the past 8 years, he duplicitously answered "No" (a copy of the petition is annexed hereto as **Exhibit "F"**).

14. Again, due to its patent deficiencies, and again, despite several explicit notifications by the Bankruptcy Court to correct them said defendant failed make any attempt whatsoever to do so or even to appear at the 341 Meeting before the assigned Trustee, again, Michael Macco, Esq.

15. As a result of these deficiencies and default this <u>second</u> bankruptcy petition was dismissed by that Court (a copy of the order and the docket of Case 8-21-67890 are collectively annexed hereto as **Exhibit "G"**).

16. Plaintiff is now in the process of advertising an auction sale for a third time and this is expected to occur within the next six (6) weeks. As of this writing the paperwork has been supplied to the legal advertising service and scheduling is currently being arranged amongst the necessary personnel for late August/early September 2021.

17. Upon consultation with bankruptcy it is our understanding that pursuant to 11 U.S.C. §362(c)(4)(A)(i), even if the defendant JWD files for bankruptcy a <u>third</u> time in attempt to thwart this upcoming auction, the automatic stay which might otherwise be created upon filing

will not be effective as a matter of law as against conducting this Court's mandated sale or against delivering title thereto.

18. It is respectfully submitted that in light of defendant's repeated, persistent and barely legal tactic of throwing marbles in the path of effectuating this Court's judgment there is substantial reason he will resort to using it again or that he may attempt a different strategy to avoid the statutory neutralizing of the stay by transferring his interest in the Premises to a third party, such as a limited liability company, a corporation or a relative or friend. In such case, counsel advises he would not even need to file for bankruptcy. While there may be legal mechanisms to undo such an illegal transfer (Debtor and Creditor §§272 and 274, among others), such remedies would be problematic, costly and certainly time consuming, allowing defendant once again to frustrate the mandate of this Court.

Application for a Preliminary Injunction

19. Although no previous application for the relief requested herein has been made in this action, it is now necessary to ask for injunctive relief to prevent a strategic concealment of the property in issue by defendant and prejudice to plaintiff's interests and to preserve the status quo in order to effectuate the Court's Judgment. Of particular urgency is the fact that, besides the immediate concern of a further upcoming auction sale and as has been pointed out by the Receiver in this action, we are presently dealing with a very hot real estate market which may be the only reason why a partition sale at this time will produce proceeds to cover all liens and expenses, a market which could change at any time. In fact I am advised by Mr. Cregan that he has received credible interest from potential purchasers despite the condition of the property and the upset price of $425,000 as stated in the Judgment.

20. It is fundamental that pursuant to CPLR § 6301 "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." Equally fundamental is that in order to be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Hightower v. Reid,* 5 A.D.3d 440, 772 N.Y.S.2d 575 (2nd Dept., 2005); *Evans-Freke v. Showcase Contr Corp.,* 3 A.D. 3d 549, 770 N.Y.S. 2d 640 (2nd Dept., 2004)). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*cf. Rattner & Assoc. v. Sears, Roebuck & Co.,* 294 A.D.2d 346, 741 N.Y.S.2d 894).

21. It is respectfully submitted that plaintiffs in this action have demonstrated each of these requirements.

22. First, with respect to the likelihood of success on the merits, it is well settled that where there is a strong showing of a likelihood of waste by the defendant and the demonstration of a fraudulent transfer of assets, this element has been sufficiently for the court to exercise its discretion in granting preliminary injunctive relief (*Nesis v. Paris Intern Lighting, Inc.* 184 A.D.2d 485, 587 N.Y.S.2d 152 (1st Dept.1992)). It is respectfully submitted that for purposes of this application, the very fact that the Court has already granted the primary relief of the complaint by virtue of having entered the Judgment, plaintiff conclusively demonstrates a "likelihood of success."

23. With respect to the second requirement, irreparable injury, as detailed above the defendant's actions have already rendered the Court's partition Judgment ineffectual up to this

point. If the defendant is permitted to continue to freely control and transfer his interest in the Premises prior to the auction sale through the additional dilatory tactic of transferring title (with or without consideration) through to when the property is ultimately deeded to the auction buyer, enforcement of the Judgment will continue to be evaded and, in addition to the attorney costs and disbursements already incurred plaintiff will incur additional costs and unnecessary financial loss which may or may not eventually be recoverable.

24. Lastly, with respect to balancing of the equities, it is respectfully submitted that this really does not seem to be a question. On one hand in favor of plaintiff, there is directive of the Court obtained through due process which requires enforcement to be carried out. Contrasted with this is the conduct of defendant JWD who has 1) continued to live expense-free in the Premises during the pendency of this action which has been delayed and delayed by his own self-serving actions even to the point of defaulting on the mortgage and causing the equity in the Premises to be consumed for his own benefit; 2) consistently failed to cooperate with plaintiff in these proceedings to the point of defaulting in answering the complaint even while being allowed to participate in court conferences attempting to settle the matter without an order, a tactic which only bought him more time; and 3) has engaged in wrongful and dilatory means to frustrate the Court's directive by abusing the statutory bankruptcy protections each time the Premises was put up for sale even to the point of falsifying the information on his second bankruptcy petition, which, like the first, was dismissed for its willful deficiencies. Moreover, plaintiff continues to accrue more and more expenses prosecuting this action and remains personally liable on the ever-increasing mortgage obligation while defendant makes no contribution to resolving the ever increasing debt either monetarily or by cooperation.

25. In light of the above plaintiff substantial has reason to believe that the defendant's wrongful conduct will likely continue on the eve of this auction sale.

26. Accordingly, plaintiff respectfully requests that the Court grant a preliminary injunction restraining plaintiff from transferring or encumbering the Premises pending this action.

Application for a Temporary Restraining Order and Waiver of 22 NYCRR 202.7 (f) Notice

27. It is respectfully submitted that in advance of the return date and hearing of this application, plaintiff also seeks a temporary restraining in that "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had" (CPLR §6313).

28. As is apparent from the conduct described above, defendant JWD has clearly demonstrated that he intends to utilize any means of which he may be aware or of which he receives counsel in order to frustrate effectuation of this Court's Judgment. While it appears that he will not now be able to use the tactic of filing a bankruptcy petition to thwart a third auction sale as he has done twice in the past, it is easily conceivable that the time between the granting of this Order to Show Cause and its return date, would afford defendant sufficient opportunity to transfer the Premises to a third-party, whether a person or a business entity of his own creation, which would effectively do so.

29. Moreover, for a similar, if not even more immediate, concern there will be significant prejudice to the movant if the notice of presentment otherwise required under 22 NYCRR 202.7(f) is required to be given to the NELSON defendant prior to the Court's consideration of the proposed Order to Show Cause. While actually creating a separate entity such as a corporation or limited liability may be difficult if not impossible in the span of time between providing one day's notice of the application's presentment, it is very possible if given warning of

an impending restraining order for the defendant to still be able to prepare a handwritten document (as he did in the case of his two bankruptcy petitions) transferring the Premises to a third-party friend or relative, and immediately file it electronically with the Suffolk County Clerk's Office under its new protocols even before we get to Court the following day.

30. Accordingly, plaintiff respectfully requests that in the event that the Court grants the Order to Show Cause that a temporary restraining order restraining defendant JWD from transferring or encumbering the Premises pending the return date of the motion and that notification of the presentment to the Court of the application for said Order pursuant to 22 NYCRR 202.7(f) be dispensed with in order to prevent the possibility of significant prejudice to plaintiff.

31. Defendant JWD has not been notified of this application. Notice of this application has been provided to the Referee John Smith and to defendant ABC BANK.

32. No prior application has been made for the relief requested herein.

Dated: Port Jefferson, New York
July 19, 2021

_____
RICHARD J. KAUFMAN

Michael J. Macco
Chapter 13 Trustee
2950 Express Drive South, Suite 109
Islandia, NY 11749

This Order relates to a hearing on [redacted]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X

In re: **tmm1634**

CHAPTER 13

[redacted]N

CASE NO. [redacted]

Debtor(s). **ORDER**
----------X

Upon the application and motion of the Trustee to determine whether the petition for relief under the provisions of Chapter 13 of Title 11 of the United States Code should be dismissed with prejudice, and same having been scheduled to be heard before the Honorable Robert E. Grossman on the [redacted]day of OCTOBER, 2021, and no written objection to the motion having been filed by the debtor, and it appearing to the satisfaction of the Court that the best interests of creditors and the estate require this case be dismissed with prejudice, and that sufficient cause has been shown, it is

ORDERED, that pursuant to the provisions of 11 U.S.C. §§109(g), 521 & 1307(c), the above referenced Chapter 13 case is hereby dismissed with prejudice, and the debtor is prohibited from filing another petition under Chapter 13 or converting a Chapter 7 to Chapter 13 for a period of ONE HUNDRED EIGHTY (180) days from the date of this Order without prior consent of the Court.

Dated: Central Islip, New York
[redacted]

United States Bankruptcy Court * Eastern District of New York *

Robert E. Grossman
United States Bankruptcy Judge

Matthew K. Mady

Campagna Johnson Mady, PC
1440 Veteran's Memorial Highway, Suite 100
Islandia, New York 11749
Phone:
631-737-8200
Email:
Matt@ny-divorce.com

About.

Mr. Mady graduated from Quinnipiac University with a double major in History and Health Science Studies, and then continued his education by attending Hofstra University Maurice A. Dean School of Law, from which he obtained his JD with a Certificate of Study in Child and Family Advocacy. While attending law school, Mr. Mady was chosen to be a member of the Family Court Review, was Editor in Chief of the Sports and Entertainment Law Digest, as well the President of the Sports and Entertainment Law Society.

Since graduating, Mr. Mady has focused his legal career solely on the practice of family and divorce law, appearing before the Courts of Suffolk, Nassau and Queens Counties, as well as the Appellate Division of the Second Department. He has also been appointed on multiple occasions by various members of the judiciary throughout Suffolk County to serve as both a referee and receiver on a wide variety of matters.

Bar Admissions

- New York, 2007

Education

- **Hofstra University School of Law, Hempstead, New York**
  - J.D. - 2006
  - Honors: Certificate of Study in Child and Family Advocacy
  - Honors: Member, Family Court Review
  - Honors: President, Sports and Entertainment Law Society
  - Sports and Entertainment Law Digest, Editor-in-Chief
- **Quinnipiac University, Hamden, Connecticut**
  - B.A., B.S. - 2002
  - Majors: History / Health Science Studies w/ a minor in Biology

Classes/Seminars

- Lecturer, Suffolk County P.E.A.C.E. Program, Suffolk County Courts, 2010 - Present
- Guest Lecturer, Touro College's Jacob D. Fuchsberg Law Center

Professional Associations and Memberships

- Suffolk County Bar Association, Member, 2007 - Present
- New York State Bar Association, Member, 2007 - Present
- New York State Solo and Small Firm Advisory Panel, Member, 2017 - Present
- Treasurer, Suffolk County Matrimonial Bar Association, Member, 2007 – Present
- Family Law Section of the New York State Bar Association, 2007 – Present

Pro Bono Activities

- Coach for the Mock Trial Team, St. Anthony's High School

CLE Presentation – The Role of a Receiver in Partition Actions

Receiver's Role

- Typically appointed to manage the property in question
- Seen mostly in actions involving commercial property, especially when there is a rental component
- Can also be appointed to sell property in question

Nuts and Bolts of the Appointment

- Fiduciary Form / Accept the appointment
- File the Oath and Notice of Appearance
- Double check your eligibility based on earnings

Bond or No Bond?

- Every Judge has their own theory on it
- If necessary, shop around and secure funding from the parties

Need for Professionals

- Absolute necessity
- Off of the Part 36 approved list
- Written request to Court with proposed Order
- Always smart to get your own attorney.

Practical Considerations

- Get on the insurance policy for the property
- Think about investing in bookkeeping software
- KEEP TRACK OF YOUR TIME – create a "client" in your time tracking software to make it easier
- Communication with counsel and the Court is key
- Attend conferences if able to

Partition and Matrimonial Actions (To be touched on very briefly)

- Typically seen when?
- Provide article for a brief background

Attachments

- Part 36 Rules
- Oath
- Sample Application for Payment
- NY Law Journal Article on Dividing Real Property in Divorce Actions

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X
MARY KARNIEWICH and ALEXIS BROCK,

Plaintiff,

AFFIRMATION

-against-

Index No.: 600011/2017

AUDREY McCORMICK and WILLIAM BENITEZ
a/k/a GUILLERMO BENITEZ,

Defendant.
----------X

MATTHEW K. MADY, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following to be true under the penalty of perjury:

1. I am the receiver appointed to sell the property located at 34 Krause Street, Bay Shore, NY 11706 and I submit this Affirmation in support of the annexed order that directs the distribution of the remaining proceeds from the sale of 34 Krause Street.

2. I was appointed by this Court as receiver to effectuate the sale of 34 Krause Street, Bay Shore, NY 11706 pursuant to a Judgment signed by the Honorable Joseph A. Santorelli dated December 5, 2018. A copy of this Judgment is annexed hereto as **Exhibit "1"**.

3. Following my appointment, I sought and was granted approval by the Court to hire Dariusz Lebiedzinski from Coach Realtors to list the property for sale and to hire Bernard J. Zimnoch, Esq. as the attorney to represent me in this matter. The Orders approving these appointments are collectively annexed hereto as **Exhibit "2"**.

4. Following some time listed on the market, offers were eventually made to purchase the residence and a Contract of Sale was entered into between myself and the

prospective purchasers on May 9, 2019 for a total purchase price of $310,000.00. A copy of this Contract of Sale is annexed hereto as **Exhibit "3"**.

5. As part of the Contract of Sale, the purchasers requested that certain repairs be made on the residence so that it may pass inspection. The Plaintiff, ALEXIS BROCK, agreed to undertake the performance of these repairs at her expense and has submitted proof of payment of same for reimbursement from the net proceeds of sale.

6. The closing of sale of the residence took place on September 3, 2019 at my office, with a total of $287,707.85 realized from the sale of the residence, following the deductions for closing costs, brokers' commissions and attorney's fees, which said total amounted to $23,399.15. A copy of the closing statement as well as the closing letter from Mr. Zimnoch is annexed hereto as **Exhibit "4"**. These documents clearly demonstrate the closing expenses associated with the property.

7. At the closing table and from the $287,707.85, three judgments against the Defendant, AUDREY McCORMICK were required to be satisfied. The judgments were $41,185.67 to the law firm of Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP, $724.00 to the Suffolk County traffic violations bureau and $370.00 to the Suffolk County District Court, for a grand total of $42,279.67.

8. Following the satisfaction of the aforementioned judgments, the net sum of $245,428.18 was remaining to be distributed between the parties and is currently in my possession. From these funds that are currently in my possession, it is suggested that the Plaintiff, ALEXIS BROCK, be reimbursed the sum of $6,148.59 off of the top of the total proceeds for monies she expended for utilities and repairs located at the 34 Krause Street residence. Additionally, from the Defendants' share of the proceeds, I am of the

opinion that the PLAINTIFF, ALEXIS BROCK be reimbursed the sum of $3,164.16 as and for expenses she incurred to clean up the residence after the Defendants vacated same. Further, from both parties' share and pursuant to the Judgment of this Court dated December 5, 2018, a fee is owed to myself as receiver of five (5%) percent of the sales price of the residence, namely the sum of $15,500.00, or $7,750.00 from each party's share. A copy of all of the receipts backing up the aforementioned work by the Plaintiff is annexed hereto as **Exhibit "5"**. Finally, and pursuant to an Order of this Court dated May 20, 2019, from the Plaintiffs' share of the proceeds, the sum of $1,880.19 should be paid to Jacob C. Turner, Esq. A copy of the May 20, 2019 Order is annexed hereto as **Exhibit "6"**.

9. For the convenience of the Court, I have broken down the preceding calculations in a separate document and have annexed same hereto as **Exhibit "7"**.

10. Based on all of the calculations contained herein, I have additionally drafted a proposed Order that I am annexing to this affirmation as **Exhibit "8"**, and also providing a courtesy copy of same.

11. The Court should be aware that prior to the closing of sale, the Plaintiff, MARY KARNIEWICH passed away, but due to the fact that Ms. Karniewich only reserved a life estate, her share equally reverted to Ms. Brock and Ms. McCormick.

12. Additionally, the Court should further be aware that since the closing of sale on the Krause Street residence, the Defendant, AUDREY McCORMICK, has passed away and any funds to be paid to her, would have to be paid instead to her estate.

13. Finally, I have annexed a breakdown of the amount of time that I have spent on this file, a copy of which is annexed hereto as **Exhibit "9"**.

14. It is respectfully requested that the Court, after reviewing the within Affirmation, execute the proposed Order so that I may distribute the remaining proceeds of sale to all parties involved.

Dated: Hauppauge, New York
October 25, 2019

_____
MATTHEW K. MADY, ESQ.

DIVISION OF REAL PROPERTY IN DIVORCE PROCEEDINGS; Law and the Family

New York Law Journal

March 25, 1997 Tuesday

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New York Law Journal

Section: Pg. 25, (col. 5); Vol. 217

Length: 2042 words

Byline: Joel R. Brandes and Carole L. Weidman

Body

Law and the Family

T HE SLOGAN share and share alike is part of the national heritage. But when it comes to spouses who are divorcing, nothing could be further from their thoughts.

When a husband and wife take title to real property as tenants by the entirety, interesting incidents of ownership arise from the legal relationship. As a tenant by the entirety, each spouse acquires an undivided half interest in the property with the right of survivorship, a right that cannot be destroyed without the consent of both spouses. While either spouse may mortgage or convey his/her interest in the property it will not impair the non-consenting spouse's survivorship interest.[1]

Tenants by the entirety do not hold partial interests. Each owns the whole, subject to the parallel right of his or her spouse. On the death of either spouse the fee vests in the other, because the survivor is the repository of the single ownership.[2] Neither spouse can dispose of any part of the property so as to affect the other's right of survivorship, nor can one spouse make contracts that bind the other, incur expenses for work not essential to preserve the property, lease the property so as to affect the other's right of possession or subject the property to right-of-way easements.[3]

Grant v. Grant[4] is an example of the effect of divorce and matrimonial agreements on real property ownership. In **Grant** the parties' divorce judgment, which incorporated their settlement agreement, called for the marital residence to be sold upon the wife's remarriage

but gave her its exclusive occupancy until sale. In exchange, she was required to bear the upkeep of the house. The wife remarried in November 1992.

As the house lingered on the market, the husband, increasingly irritated with the situation, initiated a proceeding for a judgment for half of its fair market rental value. He asserted that the wife's failure to cooperate in the sale for 14 months effectively ousted him from the property that he co-owned with her now as a tenant in common. The Appellate Division found that the wife cooperated with respect to the sale. Therefore, the husband was not ousted and was properly denied relief.

Not Subject to *Partition*

Consistent with its character, property held as tenants by the entirety is not subject to ***partition***, except by mutual consent. Even then it becomes effective only upon dissolution of the marriage. Compulsory ***partition*** is not available to a tenant by the entirety.[5] This is in contrast to jointly owned property or property held as tenants in common.[6]

In **Adams v. Holt,**[7] the plaintiff, who purchased the former husband's interest at a sheriff's sale, at a time when he and his wife were tenants by the entirety of the marital residence, had no greater rights than the husband and could not obtain ***partition***.

After the sale, the wife was granted a divorce and exclusive occupancy of the marital residence for an indefinite period of time. Since the wife was awarded exclusive occupancy, the former husband had no standing to commence a ***partition action*** unless and until the exclusive occupancy was extinguished. Likewise for the purchaser of his interest.

A divorce or dissolution of a marriage converts a tenancy by the entirety into a tenancy in common. This is not, however, the case where an ex parte divorce is obtained without service of process or appearance by a spouse.[8] Nevertheless, the subsequent marriages of both parties destroys the spousal unity concept upon which a tenancy by the entirety is based and [transforms] their ownership into a tenancy in common.[9] This renders the property subject to ***partition***.

In **Peterson v. Goldberg,** an ex-parte Florida divorce transformed the tenancy by the entirety to a tenancy in common where the husband remarried after he obtained the Florida judgment. The court held that he was estopped from denying the effect of the divorce upon his right to the estate by the entirety, subject to the right of the plaintiff wife to claim a continuance of the tenancy by the entirety.[10]

The outcome hardly differs when the marriage is not dissolved but the parties are granted a separation judgment. The Court of Appeals explained the reasoning in **Kahn v. Kahn**[11] when it suggested that although a separation decree does not dissolve the marriage, it can be argued that such a decree does legally alter the marital relationship and thus, terminates

a tenancy by the entirety, enabling a court to order the sale of a home owned by the parties as tenants in common. In **Petrucci v. Petrucci,**[12] the Fourth Department held that a separation judgment terminated the tenancy by the entirety.

Domestic Relations Law (DRL) 234 authorizes the court in any ***action*** for divorce, for a separation, for an annulment or to declare the nullity of a void marriage to award either spouse exclusive possession of the marital home during the ***action***, or in the final judgment, regardless of who holds title to the premises. Exclusive occupancy may even be awarded when a dissolution is denied.[13]

Action for Partition

The conversion of a tenancy by the entirety to a tenancy in common upon the dissolution of the marriage, authorizes an ***action for partition***, in most instances, be brought by either party under Real Property ***Actions*** and Proceedings Law 901(1).[14] It provides that [a] person holding and in possession of real property as joint tenant or tenant in common may maintain an ***action for the partition*** of the property.

To seek ***partition***, a tenant in common must be in actual or constructive possession of the premises with a current right of possession. Therefore, where one spouse is awarded exclusive occupancy of the marital residence, the other spouse loses more than possession of the property; he or she is precluded from seeking ***partition***, since that spouse is in neither actual nor constructive possession of the property.[15]

Partition is unavailable to a spouse who has agreed not to ***partition*** the property.[16] ***Partition*** will not be compelled in violation of an agreement or restriction, provided that the agreement or restriction is for a reasonable duration.[17] An agreement or judgment that awards a party an unlimited and unqualified right to the exclusive possession of real property must contain a limitation of time. Otherwise the power to alienate would be suspended for an unreasonable time. Absent an express or implied agreement to the contrary, the right to exclusive occupancy will be deemed limited to a reasonable duration.[18]

In **Sklarin v. Sklarin,**[19] the parties' 1975 judgment of divorce and agreement gave the wife exclusive occupancy until she either remarried or vacated the premises. Although neither event transpired, the former husband asserted that, because neither event may ever come to pass, the law implies that the former wife's exclusive occupancy must be limited to a reasonable period.

The Appellate Division rejected his argument, holding that an exclusive occupancy provision of a separation agreement will not be deemed limited to a court-determined reasonable period where the parties have expressly and unambiguously stipulated otherwise.

In **Hiles v. Fisher,**[20] the Court of Appeals established that the rights of husband and wife as between themselves are those of tenants in common, and each is entitled to half the rents and profits so long as the question of survivorship is in abeyance.[21] During the tenancy, a tenant by the entirety may recover from his co-tenant his just proportion of the rents and profits of the property.[22] In determining the amount due, the court may take into account, and charge against receipts, the carrying charges of the property.

The court may take into account money received and expended by any of the co-tenants during the ownership of the property; and any expenditure made by one of the tenants in excess of his share of the obligations is a charge against the interest of his co-tenants.

Where a tenant has been ousted, a court may offset, as against the co-tenant's credit for expenses incurred in maintaining the property, the reasonable value of the co-tenant's exclusive use and occupancy. In **Miraldi v. Miraldi,**[23] the court held that as defendant was wrongfully ousted by plaintiff from the marital home owned by them as tenants by the entirety, she was entitled to half the rental value from that date to the date of sale pursuant to the ***partition*** decree, after due credit to plaintiff for the expenditures made by him in connection with maintenance, mortgage, taxes and insurance.

Rental Value

Absent an agreement to the contrary, rental value cannot be recovered from a tenant in common who occupies the premises with the acquiescence of the co-tenant, unless she has interfered with the right of the co-tenant to also occupy the premises.[24] A spouse who leaves the marital home, divorces and remarries cannot expect to reoccupy the premises where it is a one-family home and, thus, cannot be excluded[25]

Where a husband voluntarily leaves the premises, obtains an ex parte divorce and the wife remarries and lives in the former marital residence with her new husband, the former husband is effectively ousted from the premises upon the remarriage and the former wife alone becomes responsible for any charges assessed against the property.[26]

The courts have put out a welcome sign to the new lives and thus new wives (and husbands) of divorced spouses. Remarried people are not required to collect rent from their new spouses. In **Soyer v. Perricone**[27] the former husband brought an ***action*** against his former wife's new husband to recover damages for his occupancy of the former marital residence. The former wife had been awarded its exclusive occupancy pursuant to a divorce judgment, until the children reach their majority.

The Supreme Court dismissed the complaint, holding that as the husband of a co-tenant, the defendant was entitled to live on the premises rent free. The Appellate Division affirmed, but added that if the plaintiff was ousted unlawfully from the premises by his former wife upon the expiration of her right to the premises under the divorce judgment,

his ***action*** for fair value of the use and occupancy of the premises would be against his former wife.

In **Mancini v. Mancini,**[28] where the parties' separation agreement required them to pay equally the house-related expenses until it was sold, the Appellate Division agreed with the Supreme Court that the former wife's remarriage did not relieve the former husband of his obligation to pay his share of the expenses related to the marital residence. The former husband was not entitled to half the rental value of the marital residence because the former wife's new husband as a guest or invitee of the former wife was entitled to live at the premises rent free.

1. **Schwab v. Krauss** (1991, 3d Dept.) 165 App. Div. 2d 214, 566 NYS2d 974

2. **Kozyra v. Goldstein** (1989) 146 Misc2d 25, 550 NYS2d 229

3. **Baker v. Westfall** (1961) 30 Misc2d 946.

4. (1996, 2d Dept) 651 NYS2d 199.

5. **Stewart v. Stewart** (1955) 208 Misc 795, 144 NYS 637.

6. **Wurz v. Wurz** (1891, Sup) 15 NYS 720; **Saxon v. Saxon** (1905) 46 Misc 191, 93 NYS 191.

7. (1988, 2d Dept.) 141 AD2d 481.

8. **Vanderbilt v. Vanderbilt,** 1 NY2d 342, affd 354 US 416; **Anello v. Anello,** 22 AD2d 694.

9. **Topilow v. Peltz,** 25 AD2d 874.

10. 146 Misc2d 474 (1989).

11. (1977) 43 NY2d 203.

12. (1984) 123 Misc2d 925, affd (4th Dept) 119 AD2d 984.

13. **Forbush v. Forbush** (1985, 4th Dept) 115 AD2d 335.

14. **Stelz v. Shreck,** 128 NY 263, 269; **Yax v. Yax,** 240 NY 590.

15. **Luvera v. Luvera,** supra.

16. **McNally v. McNally,** 129 AD2d 686.

17. **Luvera v. Luvera,** supra.

18. **Sherman v. Sherman,** 168 AD2d 550 (2d Dept. 1990) [unlimited and unqualified right to possession - 11 years]; **Surlak v. Fulfree,** 145 AD2d 79 [no conditions or limitations in agreement - 15 years]; **Luvera v. Luvera,** supra [until such time as same shall be sold - 15 years].

19. (1994, 2d Dept.) 204 AD2d 428.

20. 144 N.Y. 306.

21. See **Goodrich v. Village v. Otego,** 216 N.Y. 112.

22. **Niehaus v. Niehaus,** 141 App. Div. 251.

23. (1976, 2d Dept) 51 AD2d 538.

24. **LeBarron v. Babcock,** 122 NY 153; **Oliva v. Oliva,** 136 AD2d 611.

25. (1995, 2d Dept.) **Haberman v. Haberman** 216 AD2d 525.

26. **Topilow v. Peltz,** supra.

27. (1993, 2d Dept.) 193 App. Div. 2d 665.

28. (1995, 2d Dept.) 628 NYS2d 803.

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PART 36

The Rules of the Chief Judge

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The Rules of the Chief Judge

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PART 36. APPOINTMENTS BY THE COURT

§ 36.0 PREAMBLE

Public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach. Accordingly, these rules are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.

The rules cannot be written in a way that foresees every situation in which they should be applied. Therefore, the appointment of trained and competent persons, and the avoidance of factors unrelated to the merit of the appointments or the value of the work performed are the fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

§ 36.1 APPLICATION

(a) **Except as set forth in subdivision (b), this Part shall apply to the following appointments made by any judge or justice of the Unified Court System:**
- (1) guardians;
- (2) guardians ad litem, including guardians ad litem appointed to investigate and report to the court on particular issues, and their counsel and assistants;
- (3) law guardians who are not paid from public funds, in those judicial departments where their appointments are authorized;
- (4) court evaluators;
- (5) attorneys for alleged incapacitated persons;
- (6) court examiners;
- (7) supplemental needs trustees;
- (8) receivers;
- (9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);
- (10) the following persons or entities performing services for guardians or receivers:
  - (i) counsel
  - (ii) accountants
  - (iii) auctioneers
  - (iv) appraisers
  - (v) property managers
  - (vi) real estate brokers
- (11) a public administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator, except that only sections 36.2(c) and 36.4(e) of this Part shall apply, and that section 36.2(c) shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

(b) **Except for sections 36.2(c)(6) and 36.2(c)(7), this Part shall not apply to:**
- (1) appointments of law guardians pursuant to section 243 of the Family Court Act, guardians ad litem pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;
- (2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:
  - (i) a guardian who is a relative of (A) the subject of the guardianship proceeding or (B) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;
  - (ii) a guardian ad litem nominated by an infant of 14 years of age or over;
  - (iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;
  - (iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;
  - (v) except as set forth in section 36.1(a)(11), a public official vested with the powers of an administrator;
  - (vi) a person or institution whose appointment is required by law;
  - (vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.
- (3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(a) of this Part.

§ 36.2 Appointments

(a) **Appointments by the judge.** All appointments of the persons or entities set forth in section 36.1, including those persons or entities set forth in section 36.1(a)(10) who perform services for guardians or receivers, shall be made by the judge authorized by law to make the appointment. In making appointments of persons or entities to perform services for guardians or receivers, the appointing judge may consider the recommendation of the guardian or receiver.

(b) **Use of lists.**
- (1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.
- (2) An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person or entity that has been removed from a list pursuant to section 36.3(e).
- (3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.

(c) **Disqualifications from appointment.**
- (1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship.
- (2) No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.
- (3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the state.
- (4) (i) No person who is [the] a chair or executive director, or their equivalent, of a state or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law §73[l][k]), or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.
  (ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.
- (5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:
  - (i) The jurisdiction of a judge of the Court of Appeals shall be statewide.
  - (ii) The jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served.
  - (iii) The jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served.
  - (iv) With respect to all other judges, the jurisdiction shall be the principal county within which the judge served.
- (6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.
- (7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.

(8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.
(9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.
(10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.

(d) **Limitations on appointments based upon compensation.**
(1) No person or entity shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of $15,000.
(2) If a person or entity has been awarded more than an aggregate of $75,000 in compensation by all courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during the next calendar year.
(3) For purposes of this Part, the term "compensation" shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.
(4) These limitations shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings.

§ 36.3 PROCEDURE FOR APPOINTMENT

(a) **Application for appointment.** The Chief Administrator shall provide for the application by persons or entities seeking appointments pursuant to this Part on such forms as shall be promulgated by the Chief Administrator. The forms shall contain such information as is necessary to establish that the applicant meets the qualifications for the appointments covered by this Part and to apprise the appointing judge of the applicant's background.

(b) **Qualifications for appointment.** The Chief Administrator shall establish requirements of education and training for placement on the list of available applicants. These requirements shall consist, as appropriate, of substantive issues pertaining to each category of appointment -- including applicable law, procedures, and ethics -- as well as explications of the rules and procedures implementing the process established by this Part. Education and training courses and programs shall meet the requirements of these rules only if certified by the Chief Administrator. Attorney participants in these education and training courses and programs may be eligible for continuing legal education credit in accordance with the requirements of the Continuing Legal Education Board.

(c) **Establishment of lists.** The Chief Administrator shall establish separate lists of qualified applicants for each category of appointment, and shall make available such information as will enable the appointing judge to be apprised of the background of each applicant. The Chief Administrator may establish more than one list for the same appointment category where appropriate to apprise the appointing judge of applicants who have substantial experience in that category. Pursuant to section 81.32(b) of the Mental Hygiene Law, the Presiding Justice of the appropriate Appellate Division shall designate the qualified applicants on the lists of court examiners established by the Chief Administrator.

(d) **Reregistration.** The Chief Administrator shall establish a procedure requiring that each person or entity on a list reregister every two years in order to remain on the list.

(e) **Removal from list.** The Chief Administrator may remove any person or entity from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A person or entity may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.

§ 36.4 PROCEDURE AFTER APPOINTMENT

(a) **Notice of appointment and certification of compliance.**
(1) Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.
(2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.
(3) The certification of compliance shall include: (i) a statement that the appointment is in compliance with sections 36.2(c) and (d); and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain (A) the name of the judge who made each appointment, (B) the compensation awarded, and (C) where compensation remains to be awarded, (i) the compensation anticipated to be awarded and (ii) separate identification of those appointments for which compensation of $15,000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.
(4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

(b) **Approval of compensation.**
(1) Upon seeking approval of compensation of more than $500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance.
(2) A judge shall not approve compensation of more than $500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.
(3) Each approval of compensation of $5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.
(4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.

(c) **Reporting of compensation received by law firms.** A law firm whose members, associates and employees have had a total of $50,000 or more in compensation approved in a single calendar year for appointments made pursuant to this Part shall report such amounts on a form promulgated by the Chief Administrator.

(d) **Exception.** The procedure set forth in this section shall not apply to the appointment of a referee to sell real property and a referee to compute whose compensation for such appointments is not anticipated to exceed $750.

(e) **Approval and Reporting of Compensation Received by Counsel to the Public Administrator.**
(1) A judge shall not approve compensation to counsel to the public administrator in excess of the fee schedule promulgated by the administrative board of the public administrator under SCPA 1128 unless accompanied by the judge's statement, in writing, of the reasons therefor, and by the appointee's affidavit of legal services under SCPA 1108 setting forth in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined.
(2) Any approval of compensation in excess of the fee schedule promulgated by the administrative board of the public administrator shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be accompanied by a copy of the order approving compensation, the judge's written statement, and the counsel's affidavit of legal services, which records shall be published as determined by the Chief Administrator.
(3) Each approval of compensation of $5,000 or more to counsel shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be published as determined by the Chief Administrator.

§ 36.5 PUBLICATION OF APPOINTMENTS

(a) All forms filed pursuant to section 36.4 shall be public records.

(b) The Chief Administrator shall arrange for the periodic publication of the names of all persons and entities appointed by each appointing judge, and the compensation approved for each appointee.

PART 36 OF THE RULES OF THE CHIEF JUDGE: AN EXPLANATORY NOTE

Part 36 of the Rules of the Chief Judge creates a system that broadens the eligibility for appointment to a wide range of applicants well-trained in their category of appointment, establishes procedures that promote accountability and openness in the selection process, and insulates that process from appearances of favoritism, nepotism or politics.

1. APPLICABILITY

Part 36 governs ten categories of primary appointments and six categories of secondary appointments (§ 36.1 [a]), as set forth below.

A. Guardians

Part 36 applies to guardians appointed for: 1) incapacitated persons pursuant to Mental Hygiene Law article 81; 2) minors pursuant to Surrogate's Court Procedure Act article 17 or Civil Practice Laws and Rules article 12; and 3) the mentally retarded or developmentally disabled pursuant to Surrogate's Court Procedure Act article17-A (§ 36.1 [a][1]). If a person is appointed guardian upon a ward's nomination or a party's proposal, appointment is exempt from Part 36 (§ 36.1 [b][2][i]).

A guardianship where the appointee is a nonprofit institution, department of social services, or other public agency with legally recognized duties or interests is exempt from Part 36 (§ 36.1 [b][2]][i], [iii]). Guardianships in proceedings for the termination of parental rights (see Social Services Law § 384-b, Surrogate's Court Procedure Act § 403-a, Family Ct. Act article 6) are also exempt, since only persons or entities authorized by law may be appointed guardian in such proceedings (§ 36.1 [b][2][i], [vi]).

B. Guardians Ad Litem

Part 36 applies to guardians ad litem appointed under the general provisions of Surrogate's Court Procedure Act § 403 and Civil Practice Laws and Rules 1202, including guardians ad litem appointed to investigate and report to the court on particular issues (§ 36.1 [a][2]). Where a court appoints counsel or assistants to guardians ad litem, these appointees also are governed by the rules. If appointed a guardian ad litem upon the nomination of an infant of 14 years of age or over, the appointee is exempt (§ 36.1[b][2][ii]). Similarly exempt is a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required (§ 36.1 [b][2][vii]).

C. Law Guardians

Privately paid law guardians who are appointed in domestic relations matters in those Departments of the Appellate Division where authorized are subject to the provisions of Part 36 (§ 36.1 [a][3]). Law guardians appointed and paid from public funds are exempt (§ 36.1 [b][1]). (As a general rule, Part 36 applies only to appointees compensated at the expense of private parties, and not those compensated from public funds such as appointments pursuant to Family Court Act § 243, Surrogate's Court Procedure Act § 403-a, 407, Judiciary Law § 35, and County Law article 18-B.)

D. Court Evaluators, Attorneys For Alleged Incapacitated Persons, Court Examiners

In proceedings for the appointment of guardians for incapacitated persons pursuant to article 81 of the Mental Hygiene Law, the court may appoint an attorney for the alleged incapacitated person (Mental Hygiene Law § 81.10) or appoint a court evaluator as an independent witness to investigate and report to the court (Mental Hygiene Law § 81.09). These appointments are governed by Part 36 (§ 36.1 (a)(4), (5)), except that a nonprofit institution appointed court evaluator is exempt (§ 36.1 [b][2][iii]). The Mental Hygiene Legal Service, which may serve as attorney for an alleged incapacitated person or court evaluator, is also exempt (§ 36.1 [b][1]).

If a guardian is appointed pursuant to article 81 of the Mental Hygiene Law, the court may also assign a court examiner to audit and report on accountings required to be filed in such guardianship proceedings (Mental Hygiene Law § 81.30, 81.31). Court examiners are designated by the Presiding Justice of each Department of the Appellate Division (Mental Hygiene Law § 81.32), and, upon designation, must comply with all the provisions of Part 36 (§§ 36.1 [a][6]; 36.3 [c]).

E. Supplemental Needs Trustees

Supplemental needs trustees (see Omnibus Budget Reconciliation Act of 1993 (42 USC 1396p[d][4], EPTL § 7-1.12, SSL § 366 [2][b][2][iii], 18 NYCRR § 360-4.5) may be appointed in a number of contexts in Supreme Court or Surrogate's Court, e.g., in infants' compromise orders, or in proceedings under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law. When selected by the court and appointed by judgment or order, a supplemental needs trustee is subject to the provisions of Part 36 (§ 36.1 [a][7]), unless the appointee is a bank or trust company (§ 36.1 [b][2][iv]), or is appointed upon nomination by the beneficiary, or by the proponent, of the trust (§ 36.1 [b][2][i]).

F. Receivers

Part 36 applies to receivers almost without exception (§ 36.1 [a][8]). In rare cases where the choice of receiver would be dictated by law, such an appointee would be exempt (§ 36.1 [b][2][vi]).

G. Referees

Referees are treated differently under Part 36 depending on the purpose for which they are appointed. Under articles 31 and 43 of the Civil Practice Laws and Rules, referees, sometimes called "special masters", are often used in a quasi-judicial capacity to supervise discovery or conduct trials in civil actions or proceedings. No matter what their title, if referees are used to perform a judicial function, they are exempt from Part 36 (§ 36.1 [a][9]). Referees appointed for all other purposes are governed by the rules. These appointments are usually for the purpose of performing an act outside of court, e.g., conducting the sale of real property in a mortgage foreclosure action or supervising a labor union election.

Referees to compute the value of, and sell, real property in the ordinary mortgage foreclosure action, and who receive compensation of $750 or less, are subject to all of the provisions of Part 36 preliminary to appointment, including the disqualification provisions of section 36.2 (c), the limitations based on compensation of section 36.2 (d), and list enrollment under section 36.3. Upon appointment, however, these referees are not required to file the notice of appointment or certification of compliance that all other Part 36 appointees must file (§ 36.4 [d]). They and the court are also excepted from filing a statement of approval of compensation pursuant to Judiciary Law § 35-a (1) (a) and 22 NYCRR § 26.1 (a) (see section 5. B. infra),

because the $750 total compensation results from two separate appointments which are below the statutory threshold of $500 for each appointment (up to $250 for computation; $500 for sale).

H. Secondary Appointments Of Guardians And Receivers: Counsel, Accountants, Appraisers, Auctioneers, Property Managers, Real Estate Brokers

When a guardian or receiver subject to the provisions of Part 36 seeks to retain counsel, or an accountant, appraiser, auctioneer, property manager or real estate broker, the retained professional becomes a Part 36 appointee (§ 36.1[a][10]). The guardian or receiver must request that the judge appoint such a professional (§ 36.2 [a]), and the professional must comply with all the provisions of Part 36, including those governing list enrollment (§ 36.3), disqualification and limitation based on compensation (§ 36.2), and all filing requirements (§ 36.4).

I. Public Administrator And Counsel To Public Administrator

Certain sections of Part 36 apply to the appointment of a Public Administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator. Those sections include the disqualifications due to family relationship, employment, former employment, political party office or judicial campaign office found in section 36.2 (c) and the approval of compensation reporting requirements found in section 36.4(e).

2. APPROVED LISTS: APPLICATION, ENROLLMENT, USE

All persons or entities whose appointments are governed by Part 36 (§ 36.1 [a][1]–[10]), and who are not exempt under section 36.1 (b), must be enrolled on an approved list established by the Chief Administrator of the Courts (§ 36.3 [c]) from which all names for appointment must be selected (§ 36.2 [b][1]), except when good cause exists to appoint outside the list (§ 36.2 [b][2]). In those exceptional circumstances, the court must make a finding of good cause, in writing, and file its finding with the fiduciary clerk, who has the duty of supervising the filing of all papers in the Part 36 appointment process (see §§ 36.2 [b][2]; 36.4 [a][1], [b][1]-[3]). A copy of the finding also will be sent to the Chief Administrator of the Courts (§ 36.2[b][2]). A person or entity not appointed from an appropriate list still must comply with all the other provisions of Part 36, e.g., the appointee must not be disqualified from appointment under section 36.2(c) or (d) and must file all Part 36 forms pursuant to section 36.4, but any education and training requirements may be waived (§ 36.2 [b][3]). At no time may a court appoint a person or entity removed from a list for cause (§ 36.2 [b][2]). (See § 36.3 [e] for the procedure for removal upon the Chief Administrator's determination of unsatisfactory performance or conduct incompatible with appointment from a list.)

To enroll on a list maintained by the Chief Administrator of the Courts, an applicant must have completed the required training for each category of appointment for which enrollment is requested (§ 36.3 [b]). Once all required training is completed, an application must be submitted on the application form promulgated by the Chief Administrator (UCS-870) (§ 36.3 [a]). Court examiners for proceedings under article 81 of the Mental Hygiene Law and privately paid law guardians in domestic relations actions first must be approved by the Appellate Division before being eligible for placement on a list.

Section 36.3 (d) provides for biennial re-registration, which will permit the Chief Administrator to keep all lists current.

3. DISQUALIFICATIONS

The following persons are disqualified from appointment (§ 36.2[c]):

a. a judge or housing judge of the Unified Court System, or a relative of, or a person related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship;

b. a judicial hearing officer in a court in a county in which he or she serves as a judicial hearing officer;

c. a full-time or part-time employee of the Unified Court System;

d. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district where the relative is applying for appointment or 2) with statewide responsibilities;

e. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;

f. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge; or the spouse, brother/sister, parent or child of such former judge;

g. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;

h. a person convicted of a felony for which no certificate of relief from disabilities has been received;

i. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received; or

j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

The disqualifications for disbarred or suspended attorneys (see paragraph [g], supra) and convicted criminals (see paragraphs [h] and [i], supra) apply to any appointments under section 36.1 (a), even if otherwise exempted under the rules pursuant to section 36.1 (b).

Additionally, there are three disqualifications that do not limit list enrollment, but may render an enrollee disqualified from appointment due to the circumstances of a particular case. These disqualifications are: 1) receivers or guardians, or persons associated with the law firm of a receiver or guardian, are prohibited from being appointed counsel to the receiver or guardian (§ 36.2 [c][8]); 2) counsel to alleged incapacitated persons in Mental Hygiene Law article 81 proceedings are prohibited from being appointed guardian, or counsel to the guardian, for an incapacitated person they have represented (§ 36.2 [c][9]); and 3) court evaluators in Mental Hygiene Law article 81 proceedings are prohibited from being appointed guardian for an incapacitated person in a proceeding in which they served as court evaluator (§ 36.2 [c][10]). In the first and third of these disqualifications, exceptions may be made. If there is a compelling reason, such as savings to the estate of the receivership or guardianship, the receiver or guardian may

be appointed counsel. Similarly, if there are extenuating circumstances, such as the unavailability of others to be appointed guardian and a familiarity and trust developed between court evaluator and incapacitated person, a court evaluator may be appointed guardian upon a written finding by the court of extenuating circumstances.

There is also a disqualification relating to judicial campaign activity. This does not prevent list enrollment, but limits appointment by a judge for whom the enrollee acted as campaign chair, coordinator, manager, treasurer or finance chair in a campaign for a judicial election that took place less than two years prior to the proposed appointment (§ 36.2 [c][4][ii]). If the candidate is a sitting judge, the disqualification also applies to a person who assumes any of the above roles during the campaign for judicial office. Included in this disqualification are the spouse, brother/sister, parent or child of the campaign official, or anyone associated with the campaign official's law firm.

4. LIMITATIONS ON APPOINTMENTS BASED UPON COMPENSATION

Subdivision (d) of section 36.2 establishes two additional disqualifications from appointment, not related to list eligibility, but based upon anticipated or previously awarded compensation. These restrictions do not limit compensation per se, but use compensation as a basis for determining availability for future appointment. There are no exceptions to the application of these limitations, unless the court determines the appointment is necessary to maintain continuity of representation of the same person or entity in further or subsequent proceedings.

A. The $15,000 Rule

Section 36.2 (d)(1) prohibits appointees from receiving more than one appointment in the same calendar year (i.e., January 1 to December 31) for which compensation in excess of $15,000 is awarded in that calendar year or anticipated to be awarded in any calendar year. Two examples illustrate the rule. 1) If appointed as attorney for an alleged incapacitated person in 2003, and compensation of, for example, $20,000 for that appointment is awarded or anticipated to be awarded in that same year, then the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of $15,000 is anticipated either in 2003 or in any single future year. 2) If appointed as guardian in 2003, for which an annual commission of, for example, $20,000 is anticipated to be awarded in the following year (2004), the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of $15,000 is anticipated to be awarded either in 2003 or in any single future year.

B. The $75,000 Rule

Section 36.2 (d) (2) establishes a limitation on appointments based on an annual, aggregate amount of compensation. For calendar year 2007 and thereafter, if compensation is awarded in an aggregate amount of more than $75,000 during any calendar year (no matter what year the appointment was made), the appointee will be ineligible for any compensated appointments during the next calendar year. It is the year of the award of compensation, and not the year of its actual receipt, that activates the application of the rule. Like its $15,000 counterpart, the $75,000 rule is a limitation on appointments, and not on compensation; nothing in the $75,000 rule prevents a court's award, or an appointee's receipt, of total compensation exceeding $75,000 in any calendar year. Excess compensation in one year simply prevents compensated appointments in the following year.

5. PROCEDURE AFTER APPOINTMENT

A. Combined Notice Of Appointment And Certification Of Compliance

Part 36 appointees must complete and file with the fiduciary clerk within 30 days of appointment a two-part form containing a notice of appointment and certification of compliance (§ 36.4 [a][1]), which will be sent to the appointee by the court immediately after appointment. If the appointee cannot certify qualification for appointment in the certification of compliance section of the combined form, or cannot accept appointment for any other reason, the appointee must immediately notify the court (§ 36.4 [a][4]).

The notice of appointment contains the date and nature of the appointment (§ 36.4 [a][2]), and the certification of compliance certifies that the appointee is not disqualified from service and is not otherwise precluded by any limitation based on compensation (§ 36.4 [a][3][i]; see § 36.2 [c], [d]). The appointee must list all appointments received during the current calendar year (§ 36.4 [a][3][ii]), report the amount of compensation awarded for each (§ 36.4 [a][3][ii][B]), or, if not awarded, the total amount of compensation anticipated for each (§ 36.4 (a)(3)(ii)(C)(i)), and separately identify appointments for which compensation is anticipated to exceed $15,000 in any calendar year (§ 36.4 [a][3][ii][C][ii]). The appointee must also list all appointments for which compensation was awarded in the year immediately preceding the current calendar year (§ 36.4 [a][3][ii]) and report the amount awarded for each (§ 36.4 [a][3][ii][B]). For all appointments, the name of the appointing judge must be given (§ 36.4 [a][3][ii][A]).

There are two exceptions to this procedure. Although exempt from the application of Part 36 (see § 36.1 [b][3]), uncompensated appointees must still file the combined notice and certification form, but need only complete the notice of appointment section of the form (§ 36.4 [a][1]). This will allow uncompensated fiduciary activity to be recorded and appropriately recognized. The other exception applies to referees to compute the value of, and sell, real property. Although subject to the application and list process of Part 36 (see § 36.1 [a][9]), referees to compute and sell are relieved from the obligation to file the combined notice and certification form for appointments where total compensation is not anticipated to exceed $750 (§ 36.4 [d]).

B. Approval Of Compensation

Judges who approve compensation of more than $500 are required to file a statement of approval of compensation with the Office of Court Administration pursuant to Judiciary Law § 35-a (1)(a) and 22 NYCRR Part 26. Whenever a court is requested to approve compensation in excess of $500 for a Part 36 appointee, a statement of approval of compensation on a form promulgated by the Chief Administrator of the Courts must be submitted for signature to the approving judge. The statement must contain a confirmation signed by the fiduciary clerk that the combined notice of appointment and certification of compliance form was filed (§ 36.4 [b][1]). No judge may approve compensation of more than $500 without this statement and the signed confirmation of the fiduciary clerk (§ 36.4 [b][2]). Additionally, every approval of compensation in excess of $5000 must contain the judge's written statement of the reasons for such approval (§ 36.4 [b][3]). After signing the order awarding compensation and the statement of approval of compensation, the judge must file a copy of the order and the original statement with the fiduciary clerk. The fiduciary clerk will then forward the statement of approval of compensation to the Office of Court Administration for entry of the amount of compensation in its database under the name of the

appointee. This will keep the database current for periodic publication under section 36.5.

The rules cite the standard for judicial approval of compensation, viz., fair value for all services rendered that are necessary to the performance of the appointee's duties (§ 36.4 [b][4]). This determination remains in the sound discretion of the court and depends on the factual circumstances of each case.

6. REPORTING LAW FIRM COMPENSATION

Section 36.4 (c) obligates law firms to report, in writing, to the Chief Administrator of the Courts whenever total compensation in a single calendar year is $50,000 or more for Part 36 appointments of law firm members, associates or employees. The report of compensation received by law firms is to be filed on form UCS-876 on or before March 31st following the calendar year reported.

The reporting of law firm compensation is for informational purposes only. Limitations based on compensation apply only to the individual appointee, not the firm, and the appointment and compensation of one person in the firm are only considered in certifying the availability of that individual for appointment and do not affect the availability for appointment of any other person in the firm.

7. PUBLICATION

The notice of appointment and certification of compliance, statement of approval of compensation, and report of compensation received by law firms, filed pursuant to section 36.4, are public records, and the names of appointees and of appointing judges, and the amounts of approved compensation, are subject to periodic publication by the Chief Administrator of the Courts (§36.5).

Fid. (Individual)
UCS-870
Rev. 10/11

INSTRUCTIONS: APPLICATION FOR APPOINTMENT PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE

Part 36 of the Rules of the Chief Judge, effective June 1, 2003, requires that the judicial appointments listed below be made from lists established by the Chief Administrator of the Courts:

- **Guardian**
- **Guardian ad Litem**
- **Law Guardian (privately paid)**
- **Court Evaluator**
- **Attorney for Alleged Incapacitated Person**
- **Court Examiner**
- **Supplemental Needs Trustee**
- **Receiver**
- **Referee***(except special master or referee otherwise performing judicial functions in a quasi-judicial capacity).*

The following persons or entities performing services for guardians or receivers must also be appointed from the Chief Administrator's lists:

- **Counsel**
- **Accountant**
- **Auctioneer**
- **Appraiser**
- **Property Manager**
- **Real Estate Broker**

To be placed on a list, you must complete and submit this application and fulfill any applicable training requirements for an appointment. Beginning June 1, 2003, appointments will be made only from lists established through this application procedure; all prior lists expire on May 31, 2003. All persons or entities on prior lists must reapply to be eligible for appointment.

COMPLETING THE APPLICATION

Before you fill out the application, read the affirmation (Item 15) to determine if you are qualified to receive an appointment. Follow the instructions on the form for completing specific items.

CERTIFIED TRAINING

Part A of Item 7 of the application lists categories of appointment for which certified training is required. This training must be completed BEFORE an application may be submitted.

Certified training programs completed before June 1, 2003, will fulfill enrollment requirements for lists established on June 1, 2003, including CLE-approved programs conducted by Surrogate's Courts for guardians ad litem and certified training programs for guardians and court evaluators pursuant to Mental Hygiene Law Article 81. For all applications after June 1, 2003, no certified training programs completed more than two years before the date an application is submitted may be used to satisfy the training requirements. An attorney admitted to practice in the State of New York who has completed a certified training program for guardian and court evaluator pursuant to Article 81 of the Mental Hygiene Law may use that program in applying for enrollment on the list of attorneys for alleged incapacitated persons.

SPECIAL INSTRUCTIONS FOR APPLICANTS FOR LAW GUARDIAN (PRIVATELY PAID) AND COURT EXAMINER APPOINTMENTS

Applicants for privately paid law guardian in Departments of the Appellate Division where authorized, and for court examiner, must first be approved by the respective Appellate Divisions before lists for these positions may be established by the Chief Administrator. Applications for law guardian (privately paid) and court examiner appointments will be forwarded by the Office of Court Administration to the appropriate Appellate Division(s) for review and approval. Please contact the Appellate Division in your jurisdiction for further instructions regarding these categories of appointment.

INQUIRIES

For general information about appointments, including eligibility for list enrollment, certified training requirements, the sufficiency of prior training, and the date and location of certified training programs, contact:

NYS Office of Court Administration
Guardian and Fiduciary Services
25 Beaver Street, Suite 1110
New York, NY 10004

Internet: http://www.nycourts.gov/ip/gfs
e-mail: GFS@courts.state.ny.us
Phone: 212-428-5505

PUBLICATION

The Chief Administrator will periodically publish the names of all persons and entities appointed by each appointing judge and the compensation approved for each appointee.

FOR INFORMATION ABOUT THE FILING AND PROCESSING OF THIS APPLICATION, CONTACT:

NYS Office of Court Administration Appointment Processing Unit
Phone: 212-428-2818 e-mail: part36@courts.state.ny.us

SUBMIT COMPLETED APPLICATION (WITH ATTACHMENTS) TO:

BY MAIL - Office of Court Administration, P.O. Box 3171, Church Street Station,New York, NY 10008
IN PERSON - Office of Court Administration, 25 Beaver Street, Room 840, New York, NY 10004

- This site is not compatible with Netscape, we apologize for the inconvenience -

Click to Continue Cancel

Fid. (Individual)
UCS-870
Rev. 10/11

APPLICATION FOR APPOINTMENT PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE

THIS IS AN ON-LINE APPLICATION. THE DATA YOU ENTER IN ITEMS 1-14 BELOW WILL BE TRANSFERRED ELECTRONICALLY TO THE OFFICE OF COURT ADMINISTRATION , BUT TO COMPLETE THE APPLICATION PROCESS, YOU MUST PRINT AND SIGN THE FORM AND MAIL IT TO OCA ALONG WITH ANY ATTACHMENTS. PLEASE FOLLOW THE SPECIFIC PRINTING INSTRUCTIONS INCLUDED IN THE ON-LINE SUCCESS MESSAGE YOU WILL RECEIVE AFTER PRESSING CONTINUE FOLLOWING ITEM 15.

NOTE: BEFORE YOU COMPLETE THE APPLICATION, PLEASE CLICK HERE TO READ THE AFFIRMATION (ITEM 15) TO DETERMINE IF YOU ARE QUALIFIED.

Help

1. NAME (IF NYS ATTORNEY, ENTER NAME USED FOR ATTORNEY REGISTRATION)

FIRST | MIDDLE | LAST | SUFFIX *(Sr., Jr., III)*

2. PRIOR NAME/S:

FIRST | MIDDLE | LAST | SUFFIX *(Sr., Jr., III)*

FIRST | MIDDLE | LAST | SUFFIX *(Sr., Jr., III)*

3. SOCIAL SECURITY NUMBER:

Social Security Numbers are required in order to administer the disbursement of moneys that may constitute taxable income. 42 U.S.C. § 405 (c)(2)(C)(i).

4. ATTORNEYS ADMITTED TO PRACTICE IN NEW YORK STATE:

A- ATTORNEY REGISTRATION #: *(See your biennial registration statement, or go to www.nycourts.gov - "Attorney Directory")*

B- DATE / DEPARTMENT OF BAR ADMISSION - YEAR: / **DEPARTMENT: 1ST 2ND 3RD 4TH**

C- ARE YOU CURRENT IN YOUR REGISTRATION WITH THE OFFICE OF COURT ADMINISTRATION? YES NO

5. EMPLOYMENT:

CURRENT BUSINESS ADDRESS:

NAME OF EMPLOYER

STREET 1 | CITY/TOWN/VILLAGE | STATE NY | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

CHECK IF SELF EMPLOYED ☐ YEARS EMPLOYED (NEAREST WHOLE NUMBER)

MOST RECENT PRIOR EMPLOYMENT *(COMPLETE ONLY IF FEWER THAN 5 YEARS WITH CURRENT EMPLOYER):* NOT APPLICABLE ☐

NAME OF EMPLOYER

STREET 1 | CITY/TOWN/VILLAGE | STATE NY | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

CHECK IF SELF EMPLOYED ☐ YEARS EMPLOYED (NEAREST WHOLE NUMBER)

6. ADDRESS TO WHICH ALL NOTICES SHOULD BE SENT *(IF DIFFERENT FROM CURRENT BUSINESS ADDRESS IN NO. 5):*

BUSINESS NAME (IF ANY)

STREET 1 | CITY/TOWN/VILLAGE | STATE NY | ZIP | ZIP+4

STREET 2

PHONE | FAX | E-MAIL

7-A. CATEGORIES OF APPOINTMENT FOR WHICH CERTIFIED TRAINING IS REQUIRED:

(no application for these categories will be processed unless the required training has been completed)

- Choose the category or categories of appointment for which you are applying by checking the box next to the category.
- Enter the year of the certified training program for which you received a certificate of satisfactory completion **(For applications after June 1, 2003, training must not be more than two years before the date this application is submitted)** .
- Enter the full name of the organization that sponsored the training program (e.g., the name of a bar association, law school, nonprofit social agency, Surrogate's Court guardian ad litem training program or Appellate Division law guardian training program).
- Attorneys applying for appointment as guardian ad litem, law guardian (privately paid) and attorney for alleged incapacitated person must be current in their registration to practice law in New York State (see item 4).
- Indicate the number of times you served in the last 10 years for each category for which you are applying for appointment.
- You MAY also attach a resume of NO MORE THAN FOUR PAGES.

☐ a. **GUARDIAN:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ b. **GUARDIAN AD LITEM:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ c. **LAW GUARDIAN (PRIVATELY PAID)*:** YEAR CERTIFIED TRAINING COMPLETED

* FOR APPOINTMENTS IN THE DEPARTMENTS OF THE APPELLATE DIVISION WHERE AUTHORIZED. *(APPROVAL FOR PLACEMENT ON THIS LIST MUST BE OBTAINED FROM THE APPELLATE DIVISION. SEE INSTRUCTIONS)*

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ d. **COURT EVALUATOR:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ e. **ATTORNEY FOR ALLEGED INCAPACITATED PERSON:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ f. **COURT EXAMINER:** YEAR CERTIFIED TRAINING COMPLETED

(Approval for placement on this list must be obtained from the Appellate Division. See Instructions)

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ g. **SUPPLEMENTAL NEEDS TRUSTEE:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ h. **RECEIVER:** YEAR CERTIFIED TRAINING COMPLETED

FULL NAME OF SPONSOR ORGANIZATION:

FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

7-B. CATEGORIES OF APPOINTMENT FOR WHICH CERTIFIED TRAINING IS NOT REQUIRED:

- Choose the category or categories of appointment for which you are applying by checking the box next to the category.
- In order to apply in the following categories, **you MUST attach a resume** of NO MORE THAN FOUR PAGES, which shall include information of government-issued licenses and certificates issued by professional schools or organizations.
- Attorneys applying for appointment as counsel to guardian or counsel to receiver must be current in their registration to practice law in New York State (see item 4).
- Indicate the number of times you served in the last ten years for each category for which you are applying for appointment.

☐ i. **COUNSEL TO RECEIVER:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ j. **COUNSEL TO GUARDIAN:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ k. **ACCOUNTANT:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ l. **AUCTIONEER:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ m. **APPRAISER:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ n. **PROPERTY MANAGER:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ o. **REAL ESTATE BROKER:**
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

☐ p. **REFEREE** *(EXCEPT SPECIAL MASTER OR REFEREE OTHERWISE PERFORMING JUDICIAL FUNCTIONS IN A QUASI-JUDICIAL CAPACITY)*:
FREQUENCY OF SERVICE IN THE LAST 10 YEARS: NONE ○ 1-10 TIMES ○ MORE THAN 10 TIMES ○

8. COUNTY/COUNTIES IN WHICH YOU ARE AVAILABLE FOR APPOINTMENT:

A- B-
C- D-
E- F-
G- H-

9. FOREIGN LANGUAGES SPOKEN FLUENTLY:

*** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A-
B-
C-
D-

10. ACADEMIC DEGREES AWARDED:

*** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A-
B-
C-
D-

11. ATTORNEYS ADMITTED TO PRACTICE OUTSIDE NEW YORK STATE:

JURISDICTION OF ADMISSION	YEAR OF ADMISSION	ACTIVE STATUS: YES	NO
		○	○
		○	○
		○	○
		○	○

12. AREAS OF SPECIAL INTEREST OF ATTORNEYS ADMITTED TO PRACTICE IN NEW YORK OR ANOTHER JURISDICTION:

*** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER*

A-

B-

C-

D-

13. PROFESSIONS OR OCCUPATIONS OTHER THAN ATTORNEYS:

PROFESSION OR OCCUPATION:	** FILL IN SHADED AREA ONLY IF CODE IS 99-OTHER	LICENSING ENTITY:	YEAR LICENSE FIRST ISSUED:	ACTIVE STATUS: YES	NO
A-				○	○
B-				○	○
C-				○	○
D-				○	○

14. PERSONAL BACKGROUND:

HAVE YOU EVER BEEN, OR ARE PROCEEDINGS PENDING IN WHICH YOU MAY BE,

a.	convicted of a crime or offense, other than a traffic infraction (include military proceedings)?	○ YES	○ NO
b.	denied a professional or occupational license, or been censured by a licensing authority or had an occupational or professional license revoked or suspended?	○ YES	○ NO
c.	held in contempt of court?	○ YES	○ NO
d.	found civilly liable in an action involving fraud, misrepresentation, theft or conversion?	○ YES	○ NO
e.	discharged in bankruptcy?	○ YES	○ NO
f.	found liable for unpaid money judgments, liens or judgments of foreclosure?	○ YES	○ NO
g.	found liable for civil penalties for unpaid taxes?	○ YES	○ NO
h.	in default in the performance or discharge of any duty or obligation imposed by a judgment, decree, order or directive of any court or governmental agency?	○ YES	○ NO
i.	removed as a fiduciary by a court of competent jurisdiction for misconduct?	○ YES	○ NO
j.	in forfeiture of a bond?	○ YES	○ NO
k.	found to have committed an ethical violation as a member of a judicial, executive or legislative branch of government?	○ YES	○ NO

IF YOU ANSWERED **YES** TO ANY OF THE QUESTIONS ABOVE, YOU MUST ATTACH A SEPARATE SHEET OF PAPER AND EXPLAIN YOUR ANSWER IN DETAIL, GIVING ALL RELEVANT DATES.

15. AFFIRMATION: (CLICK HERE TO VIEW)

Continue Clear Cancel

15. AFFIRMATION:

I AFFIRM, UNDER PENALTY OF PERJURY:

- All statements contained in this application are true and accurate to the best of my knowledge;
- I have read Part 36 of the Rules of the Chief Judge (22 NYCRR), and the Explanatory Note, attached to this application;
- I have fulfilled the training requirements for each category of appointment for which I am applying (see 7-A of the application) and have retained a certificate of satisfactory completion for each training program I am required to attend, and
- I am **QUALIFIED** to file this application, because **I AM NOT:**
  a. a full-time or a part-time judge or housing judge of the Unified Court System or a relative of, or related by marriage to, a full-time or a part-time judge or housing judge of the Unified Court System within the fourth degree of relationship (Town and Village judges are judges of the Unified Court System);
  b. a full-time or part-time employee of the Unified Court System;
  c. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district in which I am applying for appointment or 2) with statewide responsibilities;
  d. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;
  e. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge, or the spouse, brother/sister, parent or child of such former judge;
  f. a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator who is applying for appointment in a particular court in which I serve on a judicial hearing officer panel;
  g. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;
  h. a person convicted of a felony for which no certificate of relief from disabilities has been received;
  i. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received;
  j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

[I Qualify, Continue] [I do not Qualify, Cancel]

Instructions To Amend The UCS 870

Application for Appointment Pursuant to Part 36

TO AMEND THE CATEGORIES OR COUNTIES OF ENROLLMENT:

- Send an e-mail to **part36@courts.state.ny.us**

or

- Send a fax to (212) 428-2819

or

- Write to OCA at the address listed below.

Include the foilowing information:

- Your full name
- Your Fiduciary ID Number (FID#)
- The first five digits of your Social Security Number

A link to (or copy of) your application will be sent to you by return e-mail (or fax or mail) along with a copy of your receipt. Please print both and make the changes, additions or deletions in ink on the appiication and receipt. Sign and date each, attach any required documentation (e.g. resume), and mail to:

Office of Court Administration
P.O. Box 3171
Church Street Station
New York, NY 10008

TO AMEND YOUR NAME, ADDRESS OR OTHER CONTACT INFORMATION:

- Send an e-mail to **part36@courts.state.ny.us** with your changes,

or

- Send a fax to (212) 428-2819 with your changes

Include the following information:

- Your fuil name
- Your Fiduciary ID Number (FID#)
- The first five digits of your Sociai Security Number

You may also mail a copy of your receipt with the changes marked in ink to:

Office of Court Administration
P.O. Box 3171
Church Street Station
New York, NY 10008

UCS- 872- Effective January 1, 2004

NOA # ☐☐☐☐☐☐☐☐☐

Notice of Appointment and Certification of Compliance

(Pursuant to 22 NYCRR § 36.4)

DATE OF APPOINTMENT: _____/_____/_____
Month Day Year

☐ Non-List

PART A — Notice of Appointment

1. Appointee's Name and Fiduciary Identification Number:

FID # ☐☐☐☐☐☐

Name:

First | Middle | Last | Suffix (Jr., Sr., III)

2. Address/Phone/FAX/Email:

Business Name (if any)

Street | City/Town/Village | State | Zip

Phone | Fax | E-Mail

3. Type of Appointment:

4. Index/File No.:

Number / Year

5. Court:

6. County:

7. Title of Action/Proceeding:

8. Case Type:

9. Appointing Judge:

First | Middle | Last | Suffix (Jr., Sr., III)

INSTRUCTIONS TO APPOINTEE

- Review the information in items 1 and 2 of Part A (Notice of Appointment) for accuracy; circle errors and enter corrections on form.
- If Fiduciary Identification Number does not appear in Part A, an appointed individual must enter Social Security Number; an appointed entity must enter Tax Identification Number:

SS/TID# ☐☐☐-☐☐-☐☐☐☐

(Social Security/Tax Identification Number is required in order to administer the disbursement of moneys that may constitute taxable income. 42 U.S.C. § 405(c)(2)(C)(I). Social Security/Tax Identification Number will not be made public.)

- Appointment WITH compensation: Complete Part B (Certification of Compliance); date and sign item 3 of Part B.

- Appointment WITHOUT compensation: do NOT complete Part B (Certification of Compliance); date and sign here:

_____ _____

Date Signature

- Return completed form as soon as possible, but no later than 30 days after appointment, to the Fiduciary Clerk for the court of appointment

IF UNABLE TO ACCEPT APPOINTMENT FOR ANY REASON, NOTIFY FIDUCIARY CLERK IMMEDIATELY.

PART B

Certification of Compliance

1. Appointment in Part A: If the compensation anticipated to be awarded in *any* single calendar year (current or future) is $15,000 or more, mark "X" in the box in Column E.

A Index/File No. (Number/year)	B Court	C County	D Appointing Judge	E Anticipated Compensation of $15,000 or more
____/____	_____	_____	_____	☐

2. Part 36 appointments RECEIVED during CURRENT calendar year:

a) Review information for current calendar year appointments provided below from the records of the Office of Court Administration; circle errors and enter corrections on this form. b) In the blank spaces below, provide information for all current calendar year appointments not pre-recorded on this form. c) Mark "X" in the box in Column E for any appointment (including pre-recorded appointments) for which compensation of $15,000 or more is anticipated to be awarded in *any* single calendar year (current or future). Include compensation already awarded in calculating anticipated compensation for the current calendar year.

A Index/File No. (Number/year)	B Court	C County	D Appointing Judge	E Anticipated Compensation of $15,000 or more
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐
____/____	_____	_____	Judge_____	☐

UCS-872 - Effective January 1, 2004

3. Part 36 appointments for which compensation was AWARDED during prior calendar year 2010 : a) Review information for prior calendar year compensation provided below from the records of the Office of Court Administration; circle errors and enter corrections on this form. b) In the blank spaces below, provide information for all appointments not pre-recorded on this form for which compensation was awarded during the prior calendar year. c) Total all amounts of compensation entered in Column E (including pre-recorded amounts) in the space provided at the bottom of the column.

A Index/File No. (Number/year)	B Court	C County	D Appointing Judge	E Compensation Awarded
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____
_____ / _____	_____	_____	_____	$_____

Total compensation awarded during prior calendar year : from Column E:
$_____

4. I certify that I am qualified to accept the appointment in Part A of this form pursuant to section 36.2(c) of the Rules of the Chief Judge (22 NYCRR) because **I AM NOT**:

a. a full-time or a part-time judge or housing judge of the Unified Court System or a relative of, or related by marriage to, a full-time or a part-time judge or housing judge of the Unified Court System within the fourth degree of relationship (Town and Village judges are judges of the Unified Court System);

b. a full-time or part-time employee of the Unified Court System;

c. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed within the judicial district of the court making the appointment in Part A of this form, or 2) with statewide responsibilities;

d. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;

e. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who served within the jurisdiction of the court making the appointment in Part A of this form, as defined by section 36.2(c)(5) of the Rules of the Chief Judge, or the spouse, brother/sister, parent or child of such former judge;

f. a person who is serving or who has served as a campaign chair, coordinator, manager, treasurer or finance chair for the campaign of the judge making the appointment in Part A of this form, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of such person, within two years following the judicial election;

g. a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator serving on a judicial hearing officer panel for the court making the appointment in Part A of this form;

h. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;

i. a person convicted of a felony for which no certificate of relief from disabilities has been received;

j. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received;

k. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

5. I certify that I am qualified to accept the appointment in Part A of this form pursuant to section 36.2(d) (**"Limitations on appointments based on compensation"**) of the Rules of the Chief Judge (22 NYCRR).

Date: _____ Signature: _____

Fiduciary Clerk should submit all completed statements to:
Appointment Processing Unit, 25 Beaver Street, Room 840, New York, NY 10004

(Mark "X" in appropriate boxes and provide all requested information.)

SUPREME COURT OF THE STATE OF NEW YORK
County: _____ **COUNTY**
----------X

Title of Action

_____
_____
_____

----------X

EX PARTE APPLICATION
for
APPROVAL OF SECONDARY APPOINTMENT
(Pursuant to 22 NYCRR § 36.1(a)(10)

INDEX NO. _____ / _____
No. ***Yr.***

APPROVAL of the following SECONDARY APPOINTEE is respectfully requested (attach one page resume):

Name: _____

Address; _____

_____

_____

Phone/FAX/Email _____

The secondary appointee will serve as: ☐ **COUNSEL** ☐ **ACCOUNTANT** ☐ **APPRAISER** ☐ **AUCTIONEER** ☐ **REAL ESTATE BROKER** ☐ **PROPERTY MANAGER.**

The secondary appointee

☐ **is on the list established by the Chief Administrator of the Courts for the category of appointment requested.**

☐ **is NOT on the list established by the Chief Administrator of the Courts for the category of appointment requested, but is otherwise qualified for appointment pursuant to Part 36 of the Rules of the Chief Judge.**

The reasons for the request are as follows (If a NON-LIST appointment is requested, include explanation of good cause for the appointment; if the Guardian or Receiver requests that he/she, or a person associated with his/her law firm, be appointed counsel, include an explanation of the compelling reason for the appointment.): _____
_____
_____
_____
_____
_____
_____
_____.

DATED: _____

Signature: _____
Print Name: _____

☐ **GUARDIAN** ☐ **RECEIVER**

Sworn to before me this _____ **day of** _____. **200**___.

_____
Notary Public

Address: _____
_____
_____
Phone _____
FAX _____
Email _____

(Mark "X" in appropriate boxes and provide all requested information.)

SUPREME COURT OF THE STATE OF NEW YORK
County: _____ COUNTY
----------X

Title of Action

_____
_____
_____

----------X

DECISION AND ORDER APPROVING EX PARTE APPLICATION for SECONDARY APPOINTMENT
(Pursuant to 22 NYCRR § 36.1(a)(10)

INDEX NO. _____/_____
No. *Yr.*

Name of Judge: _____

Upon ex parte application of _____, as
Name

☐ GUARDIAN ☐ RECEIVER, dated _____, for approval of a Secondary Appointment, it is determined that

1. A Secondary Appointment is necessary and

Name: _____

Address; _____

_____

_____

Phone/FAX/Email _____

is appropriate for appointment as: ☐ COUNSEL ☐ ACCOUNTANT ☐ APPRAISER

☐ AUCTIONEER ☐ REAL ESTATE BROKER ☐ PROPERTY MANAGER;

2. *(Choose* (a) or (b) *by marking "X" in appropriate box.)*

a. ☐ The appointee is on the list established by the Chief Administrator of the Courts for the category of appointment requested;

OR

b. ☐ The appointee is NOT on the list established by the Chief Administrator of the Courts for the category of appointment requested, but is otherwise qualified for appointment pursuant to Part 36 of the Rules of the Chief Judge, and the Court is filing with the fiduciary clerk form UCS 872.5 (STATEMENT OF REASONS FOR NON-LIST APPOINTMENT (§ 36.2(b)(2));

3. *(If this is an appointment of Guardian or Receiver, or person associated with his/her law firm, as* COUNSEL, *mark "X" in following box and provide* compelling reason.)

☐ The compelling reason for appointment of the Guardian or Receiver, or a person associated with his/her law firm, as counsel is as follows: _____
_____
_____
_____
_____
_____;

Title of Action:_____ **Index No.** _____/_____
No. *Yr.*

ACCORDINGLY, it is

ORDERED that this application for approval of a secondary appointment as

☐ **COUNSEL** ☐ **ACCOUNTANT** ☐ **APPRAISER** ☐ **AUCTIONEER**
☐ **REAL ESTATE BROKER** ☐ **PROPERTY MANAGER** **is GRANTED.**

ORDERED that _____**the secondary appointee shall immediately**
Name of Secondary Appointee
file form UCS 872;

ORDERED that compensation for the secondary appointee is subject to PRIOR court approval upon submission of an application showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, challenges presented and results achieved;

ORDERED that the applicant shall serve a copy of this order upon the secondary appointee and all persons entitled to notice in this action/proceeding by certified mail.

DATED: _____ ***Signature:***_____

File copy of this order with the Fiduciary Clerk

REPORT OF COMPENSATION RECEIVED BY LAW FIRMS FOR APPOINTMENTS PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE (§ 36.4(c))

(Complete if total compensation from appointment of law firm's members, associates and employees pursuant to Part 36 of the Rules of the Chief Judge exceeds $50,000 in a single calendar year (January 1 to December 31). File by March 31st following the calendar year reported.)

1. Calendar Year Reported:

Year ☐☐☐☐

2. Law Firm Tax ID Number

TID# ☐☐-☐☐☐☐☐☐☐

3. Name of Law Firm:

4. Address/Phone/FAX/ E-mail:

Street | City/Town/Village | State | Zip

Phone | Fax | E-Mail

5. List the names and Fiduciary Identification Numbers of the members, associates and employees of the law firm for whom compensation from appointments has been approved during the calendar year reported, and enter for each the total compensation approved during that year. For a member, associate or employee with no Fiduciary Identification Number (FID#), enter "Non-List" and his/her Social Security Number in space provided for FID#, (attach additional sheets as needed).

NAME	FIDUCIARY IDENTIFICATION NUMBER	TOTAL APPROVED COMPENSATION IN CALENDAR YEAR REPORTED
		$
		$
		$
		$
		$
		$
		$

6. Total of all compensation entered in item 5: $

Date: _____ **Signature:** _____

Print Name: _____

Title: _____
(e.g., managing attorney, member)

Mail to: ***OCA, Appointment Processing Unit, 25 Beaver Street, Room 840, New York NY 10004***

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X
MARY KARNIEWICH and ALEXIS BROCK,

Plaintiff,

- against -

AUDREY McCORMICK and WILLIAM BENITEZ,
a/k/a GUILLERMO BENITEZ

Defendant.
----------X

RECEIVER'S OATH

Index No. 600011/2017

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.:

I, MATTHEW K. MADY, ESQ., Receiver appointed by a Judgment of the HONORABLE JOSEPH A. SANTORELLI, Justice of the Supreme Court of the State of New York, County of Suffolk, made and entered in the above entitled action and bearing date, December 5, 2018, do solemnly swear that I will faithfully, honestly and impartially discharge the trust committed to me as a Receiver, and make a just and true report thereon according to the best of my understanding and as the said Order requires.

MATTHEW K. MADY, ESQ.
Receiver

Sworn to before me this
2nd day of January, 2019

NOTARY PUBLIC

Nicholas E Arazoza
Notary Public, State of New York
Qualified in ~~Monroe~~ NASSAU County
No. 02AR6282055
My Commission Expires 5/20/2021

Mark Goldsmith, Esq.

After graduating from the State University of New York at Albany and receiving his Juris Doctor from Touro College Jacob D. Fuchsberg Law Center in 1983, Mark J. Goldsmith was admitted to practice as attorney before the Courts of the State of New York on February 8, 1984. He is also admitted to practice before the U.S. District Courts of the Eastern, Southern, and Northern Districts of New York and the U.S. Federal Court of Claims in Washington, D.C.

He began his career as a commercial litigator and then as a negligence trial lawyer for the law firm of Siben & Siben in Bay Shore, New York. In 1988, he founded the law firm of Jakubowski, Robertson & Goldsmith, engaging in the general practice of law with an emphasis on negligence and commercial matters as a trial attorney as well as commercial and residential transactional and litigation matters. The firm merged with Maffei Condon LLP in 2007 to form Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP. He continues as the managing partner. The firm is counsel to several local well known businesses.

He has been involved in the following professional and neighborhood organizations:

- Suffolk County Bar Association
- Suffolk County Bar Association Judicial Screening Committee member
- New York State Bar Association, including the Insurance and Negligence Attorneys Section
- Suffolk County Retired Detectives Association, as the organizing attorney and counsel
- B'nai Israel Reform Temple
- Saint Mary's CYO
- East Islip Soccer Club

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

JANE SMITH and JOHN JONES,

Plaintiff(s),

Index No.

-against-

ELIZABETH JOHNSON and WELLS FARGO BANK, N.A.,

Defendants.

----------X

Plaintiffs JANE SMITH and JOHN JONES, by their attorney, RICHARD J. KAUFMAN, ESQ., as and for their complaint alleges as follows:

FIRST: That at all times hereinafter mentioned, plaintiff JANE SMITH (hereinafter referred to as "SMITH") was and still is a resident of the County of Suffolk, State of New York.

SECOND: That at all times hereafter mentioned, plaintiff JOHN JONES was a resident of the County of Suffolk and is currently a resident of the State of Georgia.

THIRD: That at all times hereinafter mentioned plaintiff JANE SMITH was and still is the natural mother and parent of plaintiff JOHN JONES.

FOURTH: That at all times hereinafter mentioned, defendant ELIZABETH JOHNSON (hereinafter referred to as "JOHNSON") was and still is a resident of the County of Suffolk, State of New York.

FIFTH: That in or about November 21, 2008 and defendant JOHNSON was the fiancée of the plaintiff JONES and the mother of his child and thus stood at that time in a

close and confidential relationship to the plaintiff JONES. Subsequently, said plaintiff and defendant had another child together.

SIXTH: That in or about November 21, 2008 defendant JOHNSON was the future daughter-in-law of the plaintiff SMITH and thus stood at that time in a close and confidential relationship to the plaintiff SMITH.

SEVENTH: That defendant WELLS FARGO BANK, N.A. is a foreign corporation with corporate offices at 420 Montgomery Street, San Francisco, California and is duly licensed to transact banking and/or mortgage business in the State of New York.

EIGHTH: That at all times hereinafter mentioned, the premises in issue is located in the County of Suffolk at 125 Floyd Road, Shirley, New York, and is otherwise described as follows:

> ALL that certain plot, piece or parcel of land, situate and being in the Town of Brookhaven, County of Suffolk and State of New York, being a described parcel shown on a certain map entitled, "Plan of Section "A", Tangier, Southshore, Suffolk County, Long Island surveyed and mapped for Tangiers Manor Corporation by Frank Middleton, C.E." filed in the Office of the Clerk of the County of Suffolk on March 11, 1911, as Map No 600, and being bounded and described as follows:
>
> BEGINNING at a point on the easterly side of Floyd Road, distant 418.44 feet from the corner formed by the intersection of the southerly side of Pawnee Avenue with the easterly side of Floyd road;
>
> RUNNING THENCE South 0 degree 12 minutes 40 second West, 75.00 feet to the land of the Union Free School District No. 32;
>
> RUNNING THENCE South 89 degrees 47 minutes 20 seconds East along said lan 155.27 feet to the westerly line of Map of Mastic Acres, Unit Map No. 1465;
>
> RUNNING THENCE along said map North 0 degrees 17 minutes 00 seconds East, 75.00 feet to land now or formerly of James Weeler, Jr.;
>
> RUNNING THENCE along land now or formerly of James Weeler, Jr., North 89

degrees 47 minutes 20 second West, 155.36 feet to the easterly side of Floyd Road at the point or place of BEGINNING.

said Premises also being designated as Tax Map Parcel Dist: 0200 Sect: 938.00 Block: 01.00 Lot: 002.000 (hereinafter referred to as "the Premises").

AS AND FOR A FIRST CAUSE OF ACTION

NINTH: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "EIGHTH" with the same force and effect as though more fully set forth at length herein.

TENTH: That on or about November 21, 2008, plaintiff JANE SMITH was the owner in fee of the Premises having acquired her interest by deed from one Anthony Alibradi and Particia Alibrandi dated June 16, 2004 and recorded in the Suffolk County Clerk's Office on July 1, 2004 in Liber 23428 Page 355.

ELEVENTH: That shortly prior to November 21, 2008, plaintiff JONES and his fiancée defendant JOHNSON offered to purchase the Premises from JONES's mother, plaintiff SMITH, for the sum of TWO HUNDRED AND THIRTY SIX THOUSAND and 00/100 ($236,000.00) DOLLARS.

TWELFTH: That at that time in order to finance the purchase of the Premises, JONES and defendant JOHNSON were in need of mortgage financing from a lending institution and, in addition, a so-called "gift of equity" from plaintiff SMITH.

THIRTEENTH: That since plaintiff JONES was unable to qualify for a mortgage on the Premises due to his financial circumstances, although the Premises was intended to be purchased by both JONES and defendant JOHNSON, mortgage financing in the amount of ONE HUNDRED FORTY THOUSAND FIVE HUNDRED and 00/100 ($140,500.00) DOLLARS was obtained solely in the name of defendant JOHNSON.

FOURTEENTH: That since plaintiff JONES and defendant JOHNSON did not otherwise have the funds needed, the balance of the purchase price, closing costs and the satisfaction of defendant JOHNSON's personal debt in the amount of $19,515.92 was in effect contributed by plaintiff SMITH in the form of a "gift of equity" in the amount of ONE HUNDRED AND TWELVE THOUSAND and 00/100 ($112,000.00) DOLLARS.

FIFTHTEENTH: That the purchase of the Premises by plaintiff JONES and defendant JOHNSON from plaintiff SMITH occurred on or about November 21, 2008 wherein the Premises were transferred into the defendant JOHNSON's name only.

SIXTEENTH: That said deed was dated November 21, 2008 and filed with the Clerk of Suffolk County on December 1, 2008 in Liber 12573 Page 505.

SEVENTEENTH: That it was always contemplated by all parties that plaintiff JONES would own a one-half interest in the Premises and that a new deed would eventually be filed ratifying plaintiff's one half interest in the Premises.

EIGHTEENTH: That the "gift of equity" was provided by plaintiff SMITH specifically for the benefit of her son's interests and with the explicit understanding by all parties that plaintiff JONES would be an equal owner of the Premises together with defendant JOHNSON.

NINETEENTH: That from on or about November 21, 2008 to in or about November, 2013, plaintiff JONES and defendant JOHNSON continued to reside in the Premises together, each contributing to the household expenses and/or the mortgage payments.

TWENTIETH: That in or about July, 2013 plaintiff JONES and defendant JOHNSON broke off their engagement.

TWENTY-FIRST: That as a consequence thereof, plaintiff JONES moved out of the Premises in or about November, 2013 and defendant JOHNSON has continued to reside therein to this date to the exclusion of plaintiffs.

TWENTY-SECOND: That since that time plaintiffs have on several occasions demanded that defendant JOHNSON execute a deed establishing plaintiff JONES's one half (1/2) interest in the Premises.

TWENTY-THIRD: That despite said demand defendant JOHNSON has refused to execute a deed ratifying plaintiff JONES's one half (1/2) interest in the Premises.

TWENTY-FOURTH: That the plaintiffs relied on the close and confidential relationship with the defendant JOHNSON in providing a "gift of equity" and in allowing her to receive a deed to the Premises solely in her name.

TWENTY-FIFTH: That said close and confidential relationship created a special fiduciary duty on the part of the defendant as to the manner in which she dealt with plaintiffs individually or jointly.

TWENTY-SIXTH: That the defendant breached her fiduciary to the plaintiffs in having plaintiffs permit conveyance of title to the Premises to her in her sole name, in inducing plaintiff to execute the deed without the benefit of a written document setting forth the agreement between them and without transferring legal title to plaintiff JONES.

TWENTY-SEVENTH: That plaintiff(s) has/have no adequate remedy at law.

TWENTY-EIGHTH: That as a result of defendant JOHNSON's egregious breach of her fiduciary duty to plaintiff(s), plaintiff(s) is/are entitled to specific performance conveying a one half (1/2) interest in the Premises to plaintiff JONES.

AS AND FOR A SECOND CAUSE OF ACTION

TWENTY-NINTH: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "TWENTY-EIGHTH" with the same force and effect as though more fully set forth at length herein.

THIRTIETH: That as a result of defendant JOHNSON's egregious breach of her fiduciary duty to plaintiff(s), plaintiff(s) is/are entitled to damages in an amount to be determined by a trial of this action.

AS AND FOR A THIRD CAUSE OF ACTION

THIRTY-FIRST: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "THIRTIETH" with the same force and effect as though more fully set forth at length herein.

THIRTY-SECOND: That as a result of the facts set forth above, defendant JOHNSON would be unjustly unriched if she were allowed to retain full legal title to the Premises and not convey a one half (1/2) interests to plaintiff JONES.

THIRTY-THIRD: That as a result of defendant JOHNSON otherwise being unjustly enriched by her own malfeasance, plaintiff(s) is/are entitled to specific performance conveying a one half (1/2) interest in the Premises to plaintiff JONES.

AS AND FOR A FOURTH CAUSE OF ACTION

THIRTY-FOURTH: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "THIRTY-THIRD" with the same force and effect as though more fully set forth at length herein.

THIRTY-FIFTH: That in order to induce plaintiffs to provide "gift of equity" in the amount of ONE HUNDRED AND TWELVE THOUSAND and 00/100 ($112,000.00)

DOLLARS and allow a deed to be executed to her conveying the Premises in her sole name, defendant JOHNSON made affirmative and material misrepresentations of fact to plaintiffs that she would in fact convey a one half (1/2) interest in the Premises to plaintiff JONES.

THIRTY-SIXTH: That defendant knew at the time she made said statement that same was in fact untrue in that she did not intend at that time to transfer an interest in the Premises to plaintiff.

THIRTY-SEVENTH: That the plaintiffs relied on said fraudulent misrepresentations in providing a "gift of equity" and conveying the Premises to the defendant.

THIRTY-EIGHTH: That as a result of defendant's fraudulent actions, plaintiff(s) is/are entitled to rescission of said agreement and an order of the Court setting aside the conveyance from the plaintiff to the defendants above-described.

AS AND FOR A FIFTH CAUSE OF ACTION

THIRTY-NINTH: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "THIRTY-EIGHTH" with the same force and effect as though more fully set forth at length herein.

FORTIETH: That by reason of the aforesaid, plaintiff(s) is/are entitled to an order impressing a constructive trust on the Premises in plaintiff(s)' favor as against defendant's interests.

AS AND FOR A SIXTH CAUSE OF ACTION

FORTY-FIRST: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "FORTIETH" with the same force and effect as though more fully set forth at length herein.

FORTY-SECOND: That by reason of the aforesaid, the plaintiff is entitled to a judgment of this Court impressing a lien on the Premises in her favor as against the defendant's interests in an amount to be determined at a trial of this action.

AS AND FOR A SEVENTH CAUSE OF ACTION

FORTY-THIRD: That plaintiff repeats, reiterated and realleges each and every allegation contained in paragraphs "FIRST" through "FORTY-SECOND" with the same force and effect as though more fully set forth at length herein.

FORTY-FOURTH: That by reason of the foregoing plaintiff JONES and defendant JOHNSON each have a one-half interest in the Premises as tenants in common.

FORTY-FIFTH: That the premises are presently appear to be encumbered by two mortgages now held defendant WELLS FARGO BANK, N.A.: first, to secure the payment of the sum of ONE HUNDRED THIRTY-NINE THOUSAND THREE HUNDRED AND EIGHTEEN and 00/100 ($139,318.00) DOLLARS, which said Mortgage was recorded on April 20, 2010 in the Office of the Clerk of Suffolk County, in liber M0001039 page(s) 415 and 416 and 2) to secure the payment of the sum of NINE THOUSAND FIVE HUNDRED AND NINETEEN and 20/100 ($9,519.20) DOLLARS which said Mortgage was recorded on April 3, 2014 in the Office of the Clerk of Suffolk County in liber M00022475 page 663.

FORTY-SIXTH: That said mortgages are liens and/or encumbrances upon the legal and equitable interests of both plaintiff JONES and defendant JOHNSON in the Premises.

FORTY-SEVENTH: That plaintiff JONES, and upon information and belief defendant JOHNSON, are of full age and of sound mind.

FORTY-EIGHTH: That no other lands other than the aforesaid Premises, are owned either in common or as joint tenants by the plaintiff JONES and defendant JOHNSON in this state.

FORTY-NINTH: That plaintiff is desirous of satisfying the mortgage liens against the Premises and is otherwise desirous of selling his interest in the Premises.

FIFTIETH: That despite plaintiff's demands for defendant JOHNSON to cooperate in a sale of the Premises or otherwise satisfy the mortgage liens against it, defendant has refused to do so.

FIFTY-FIRST: That the premises are so situated that a division or partition thereof among the parties entitled thereto according to their respective rights and interests, cannot be made without prejudice to the owners thereof.

FIFTY-SECOND: No request for the relief herein has previously been made.

WHEREFORE, plaintiff demands judgment:

(a) On the FIRST CAUSE OF ACTION granting an order declaring plaintiff JONES to be a one half owner of the Premises and granting specific performance conveying a one half (1/2) interest in the Premises to plaintiff JONES;

(b) On the SECOND CAUSE OF ACTION for damages in favor of plaintiffs in an amount to be determined at a trial of this action;

(c) On the THIRD CAUSE OF an order declaring plaintiff JONES to be a one half owner of the Premises and granting specific performance conveying a one half (1/2) interest in the Premises to plaintiff JONES;

(d) On the FOURTH CAUSE OF ACTION granting rescission of the agreement between plaintiff and defendants for conveyance of the Premises and granting an order of the Court setting aside said conveyance;

(e) On the FIFTH CAUSE OF ACTION granting an order impressing a constructive trust on the Premises in plaintiff's favor as against the defendants' interests;

(f) On the SIXTH CAUSE OF ACTION impressing a lien on the Premises to in plaintiffs' favor as against the defendants' interests in an amount to be determined at a trial of this action; and/or

(g) On the SEVENTH CAUSE OF ACTION directing partition of the Premises; directing that said premises be sold by and under the direction of the Court; directing that out of the money derived out of said sale the defendant WELLS FARGO BANK, N.A. and any other creditor having priority interest in the premises ahead of the parties' interest be paid out of said sale; and directing that the residue of the money arising from said sale be divided and paid to the said parties according to their respective rights and interest as aforesaid;

together with attorneys fees, costs, disbursements and interests of this action and such other

and further relief as may seem just and proper to the Court.

Dated: Port Jefferson, New York
March 12, 2015

_____

RICHARD J. KAUFMAN
Attorney for Plaintiffs
646 Main Street
Port Jefferson, NY 11777
(631) 331-0950

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X
YEN BUI,

Plaintiff, Index # 97-14000

-against- **ANSWER WITH COUNTERCLAIMS**

JIM BUI, FLEET REAL ESTATE FUNDING CORP., TRACY MOHR, JANE DOES 2 THROUGH 3 and JOHN DOES 1 THROUGH 3,

Defendants.
----------X

Defendants JIM BUI and TRACY WALSH s/h/a TRACY MOHR, by their attorney, RICHARD J. KAUFMAN, ESQ., answering the complaint, alleges:

FIRST: Denies each and every allegation contained in Paragraphs "First", "Third", "Seventh", "Eight", "Ninth", and "Tenth".

SECOND: Denies each and every allegation contained in Paragraph "Fourth", except that on or about August 16, 1993 defendant FLEET REAL ESTATE FUNDING CORP. gave a mortgage to defendant JIM BUI and plaintiff to secure payment of the sum of $130,700.00, which said mortgage was recorded on August 20, 1993 in the Office of Register of Suffolk County, in liber 18696, page 345, and said mortgage is a lien upon the property.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
AND COUNTERCLAIM FOR AN ACCOUNTING

THIRD: During the period from August, 1993 to the present for which plaintiff claims the right, title and interest upon which this action is predicated, defendant BUI paid various and diverse sums to protect and preserve said property, and further payments resulting in substantial benefits enhancing the value of the entire property.

FOURTH: These payments made for the direct benefit of the real property

include, but are not limited to, such sums paid for principal and interest on the mortgage, real estate taxes, property insurance, capital improvements and major repairs.

FIFTH:Defendant BUI has received no reimbursement for any part of such expenditures paid on behalf of the parties in this action.

SIXTH: Upon partition, if such is ordered by the Court, defendant BUI is entitled to have a larger interest set aside proportionate to the amount of defendant's expenditures for the entire property and sums hereinabove described.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
AND COUNTERCLAIM FOR IMPOSITION OF
A CONSTRUCTIVE TRUST

SEVENTH: Plaintiff has no present right to partition in that, excepting the mortgage lien of defendant FLEET REAL ESTATE FUNDING CORP., defendant BUI is the owner of all equitable and legal interests in the real property in issue.

EIGHTH: Plaintiff is a resident of the County of Queens, State of New York.

NINTH: Defendant BUI is a resident of the County of Suffolk, State of New York and currently resides at 5 Himmel Court, Coram, New York, i.e. the real property in issue.

TENTH: Defendant BUI is the plaintiff's son, and at all times prior to and at the time of the delivery of the deed hereinafter mentioned, the most confidential relations existed between defendant and plaintiff, and defendant reposed great trust and confidence in plaintiff, and relied heavily on plaintiff's advice in his business and other affairs.

ELEVENTH: At all times defendant believed that plaintiff would deal fairly and justly with him, and that plaintiff would never abuse their confidential relationship.

TWELFTH: In or about Spring, 1993, defendant was in the process of looking for

housing in Suffolk County near to where he worked as an air traffic controller for the Federal Aviation Administration. Although earning a substantial salary which could support mortgage payments and upkeep on a house, defendant was unable to purchase a home due to a poor credit record at that time and available funds for closing.

THIRTEENTH: At the behest of the plaintiff, it was suggested that purchasing a home would be better for defendant financially and that in order to assist defendant, plaintiff advanced certain sums towards closing costs and improvements and also applied as co-borrower on the mortgage.

FOURTEENTH: On or about August 12, 1993, defendant and plaintiff purchased, in their joint names, the premises in issue, plaintiff holding title only for the purpose of securing the mortgage provided by defendant FLEET REAL ESTATE FUNDING CORP. Said premises immediately became the sole residence of defendant.

FIFTEENTH: As part of the circumstances hereinabove described, plaintiff did promise and/or it can be or inferred from the circumstances of the transaction, including the fact that plaintiff required defendant to take the responsibility to pay for all expenses and improvements, that she would convey her interest to defendant at some time after the sale when the advancements had been reimbursed and that said transfer was made on reliance of this promise/understanding.

SIXTEENTH: From the date that said premises were purchased through to the present, defendant BUI has paid all sums towards principal and interest on the mortgage, real estate taxes, property insurance, capital improvements and major repairs, and any and all sums necessary to preserve and maintain the structure and title to the premises. In addition defendant has long since reimbursed, in full, all sums advanced by plaintiff towards these expenditures.

SEVENTEENTH: In or about 1996, the relationship between defendant and plaintiff became estranged due to personal differences relating to a family dispute. Subsequently, plaintiff commenced this action for partition.

EIGHTEENTH: Upon information and belief, the sole motivation of plaintiff in seeking partition of the premises is to cause defendant emotional distress and unnecessary expenses in retaliation for perceived petty personal wrongs since upon a partition sale of the premises and the payment of the first mortgage lien, no equity will be realized and both parties will become personally obligated to the mortgagee for substantial sums.

NINETEENTH: The true and only consideration for the delivery of the deed to plaintiff was the trust and confidence which defendant reposed in her and defendant's justifiable belief that plaintiff would comply with his request to convey the real property to defendant. Defendant would not have permitted delivery of the deed to plaintiff if he had not reposed great trust and confidence in plaintiff.

TWENTIETH: Plaintiff entered into the above agreement with defendant with no intention of honoring same, and made the above promises and induced defendant to purchase said property and expend large sums, all for the purpose of defrauding defendant and inducing him to cause to be delivered said deed to plaintiff.

TWENTY-FIRST: By reason of plaintiff's fraudulent inducement to defendant to believe that she would eventually convey the premises to him, and the bringing of this action for partition in which plaintiff affirmatively continues to assert an interest in the premises, plaintiff has violated the trust and confidence placed in her by defendant and seeks unjust enrichment solely by means of fraud and breach of confidence.

WHEREFORE, defendants demand judgment as follows:

1) Dismissing the complaint in its entirety;

2) On the First Counterclaim, an accounting determining the proportionate share to which defendant BUI is entitled based upon said defendant's expenditures on behalf of plaintiff and for the benefit of the entire property and declaring a lien upon said property for said amount;

3) On the Second Counterclaim,

a) declaring that plaintiff holds the real property in issue in this action in trust for defendant;

b) requiring plaintiff to convey said real property to defendant;

4) For costs and disbursements of this action;

5) For such other and further relief as to the court may seem just and equitable.

Dated: Port Jefferson, NY
July 11, 1997

RICHARD J. KAUFMAN
Attorney for Defendants JIM
BUI and TRACY WALSH s/h/a TRACY
MOHR
646 Main Street
Port Jefferson, NY
(516) 331-0950

AS AND FOR A FIRST COUNTERCLAIM AGAINST THE PLAINTIFF

1. At all times hereinafter mentioned, Defendant, *******, upon information and belief, was and still is a resident of the County of Suffolk, State of New York, residing at _____, New York.

2. Plaintiff and defendant are Father and Son.

3. Plaintiff is skilled in the business of real estate development.

4. Defendant is the owner of record of two parcels of vacant unimproved property (the "subject properties") transferred by the Plaintiff without consideration.

5. The first parcel (hereinafter referred to as Parcel "A") Defendant acquired included Lots 27, 29, 31, 33, and 35 by deed dated -DATE- recorded in Liber #, page #. Defendant acquired Lots 37, 39, 41, 43, and 45 by deed dated -DATE- recorded in Liber #, page #. Copies of the deeds for these lots for the first parcel, Parcel A, are annexed hereto collectively as **Exhibit "A"**.

6. The second parcel (hereinafter referred to as Parcel "B") Defendant acquired included Lots 55, 57, 59, 61, 63, and 65 by deed -DATE- recorded in Liber #, page #. Defendant acquired Lots 56, 58, 60, 62, 64, and 66 by deed dated -DATE- recorded in Liber #, page #. Copies of the deeds for these lots for the second parcel, Parcel B, are annexed collectively hereto as **Exhibit "B"**.

7. At all times hereinafter mentioned, plaintiff and defendant constituted a closely-knit family unit, bound together by love and devotion, each of whom had and reposed implicit trust and confidence in the other.

8. In or about -DATE-, upon information and belief, prior to defendant's acquisition of the subject properties, plaintiff and defendant entered into an agreement as follows:

(a) Defendant would accept the subject properties in defendant's name, without paying any consideration but defendant promised that the subject properties would be owned for the benefit of plaintiff;

(b) All of the purchase price was paid for by plaintiff.

(c) Plaintiff would pay the costs of acquiring the subject properties, and the carrying costs, including taxes upon presentation of the tax bills;

(d) The deeds were being held by defendant for the sole purpose of preserving the properties' status as "single and separate" for purposes of zoning and subsequent development and subdivision of the properties;

(e) The defendant would agree to execute any document including but not limited to an application for a sub-division of the lots owned by plaintiff and defendant among others, would transfer the properties to the plaintiff or plaintiff's successor or assigns without consideration, upon plaintiff's request to do so or otherwise as directed by the plaintiff.

9. At the time of the aforesaid agreement, in order to preserve the existing zoning and prevent the merger of contiguous lots, it was necessary that defendant have complete legal title to the property.

10. At the time of the aforesaid agreement and prior to the delivery of the deeds to defendant (Exhibits "A" and "B"), plaintiff had the utmost trust

and confidence in defendant as his son, and in defendant's devotion and fidelity to him. By reason of this confidence, and in reliance on the representations of defendant described above, and in justifiable reliance on the promises made by defendant in the agreement referred to above, plaintiff contributed all of the money to acquire and carry the properties.

11. Although the deeds (Exhibit "A" and "B") are absolute in form, purporting to place complete title to the subject properties in defendant, the purpose of the deeds was to enable defendant to hold title to the subject properties in trust for the purposes previously agreed on by plaintiff and defendant.

12. As alleged above, defendant holds legal title to the subject properties in constructive trust for the benefit of plaintiff.

13. Defendant has completely failed and refused to develop, manage, operate or own the subject properties as properties to be developed by his father, and has instead devoted the subject properties for his sole use and benefit, by attempting to oust the plaintiff without any compensation.

14. From 2015 and continuing to date, plaintiff demanded of defendant that he convey to him or his designated entity owned by plaintiff or a successor, the subject properties, but defendant has failed and refused, and still fails and refuses to do so.

15. Defendant has been unjustly enriched by the acts set forth above.

16. Plaintiff has no adequate remedy at law.

Another Form:

AS AND FOR A SEPARATE AND DISTINCT COUNTERCLAIM, DEFENDANT ALLEGES:

33. Since about January, 20__, plaintiff voluntarily removed from premises *ADRESS*, New York.

34. By virtue of her co-ownership, plaintiff remains liable for one-half of the carrying charges for said premises.

35. Therefore, defendant demands judgment against plaintiff for one-half of all carrying charges from January, 20__ to a date to be ascertained and determined by virtue of an accounting between the parties.

AS AND FOR DEFENDANT'S AFFIRMATIVE DEFENSE AND COUNTERCLAIM TO PLAINTIFF'S FIRST CAUSE OF ACTION, DEFENDANT ALLEGES:

36. The parties herein have been unmarried partners since the year of 1989 as indicated in paragraph "14" of the complaint.

37. The demised property was transferred to the parties herein by defendant's mother in the year 1990.

38. The transfer was for less than fair market consideration at the time due to special considerations, one of which was that the grantor was the mother of the defendant.

39. That by reason thereof, the parties herein had agreements as to the following:

a) that if the plaintiff desired to sell the property or her interest therein, defendant would have the right of first refusal; and

b) that the parties herein would share as co-owners, equally, as to all expenses of owning the property including maintenance expenses and for improvements.

10. That since 1990, defendant has expended in excess of Three Hundred Eighty-eight Thousand ($388,000.00) Dollars for such expenses related to the ownership, maintenance and improvements of the demised premises.

11. That since 1995, upon information and belief, the plaintiff has not expended any moneys for expenses of ownership, maintenance and/or improvements.

12. That upon information and belief, an accounting between the parties will reveal that defendant's contributions and equities will exceed plaintiff's contributions and her fifty (50%) percent equity in the demised premises.

13. That by reason of the aforesaid, defendant demands judgment against the plaintiff and requests the Court to dismiss plaintiff's first cause of action, and in lieu thereof, based upon the accounting to be rendered under paragraph "12." hereinabove, to order the plaintiff to convey her 50% co-owner interest in the demised property to defendant and further grant judgment to defendant for such relief and for any overage found to be owing from plaintiff to defendant.

Glenn P. Warmuth

GLENN P. WARMUTH attended the State University of New York at Stony Brook and received a BA with honors in Sociology with a minor in Theatre. Mr. Warmuth received his JD from St. John's University School of Law in 1999 as a Dean's List graduate. He is a member of the Suffolk County Bar Association and New York State Bar Association. Mr. Warmuth is admitted to practice in all New York State Courts, the Second Circuit Court of Appeals, the U.S. District Courts for the Eastern, Southern, Northern and Western Districts of New York and the United States Supreme Court. Mr. Warmuth volunteers his time each year to work with elementary, middle and high school students: as co-coordinator for the Suffolk County Regional Competition of the New York State High School Mock Trial Competition, as a judge of the We The People: The Citizen and the Constitution contest and as a judge of the Western Suffolk BOCES Mock Trial Tournament. He has served as the coach for the Holy Angels Regional School Mock Trial Team and served on the Holy Angels school board (2012-2016). Mr. Warmuth also works at the Suffolk County District Court where he decides small claims cases. Suffolk

County Bar Association

- Co-Coordinator - Suffolk County High School Mock Trial Tournament (2016-Present) Board
- of Directors - Director (2012-2015)
- Suffolk Academy of Law - Officer (2011-2015)
- Suffolk Academy of Law - Advisory Committee Member (2015-Present)
- Appellate Practice Committee - Co-Chair (2011-2013, 2019-Present)
- Creditors' Rights Committee - Member, Former Co-Chair
- Leadership Development Committee - Member (2015-Present)
- Bench - Bar Committee - Member (2017-Present)
- Nominating Committee - Member (2015-2018)
- Technology Committee -Member (2018-Present)
- Charitable Foundation – Assistant Managing Director (2013-2015)
- "Dog Day Afternoon" - Volunteer (2012-2015)
- Surrogate's Court Committee - Member
- Awarded on three occasions for providing pro-bono legal services as part of Bar Association's foreclosure settlement project

Continuing Legal Education Seminars:

- Speaker - Basics of Appellate Practice 2021
- Moderator - Avoiding The Foreclosure Tsunami 2020
- Coordinator - New Rules of the Appellate Terms 2020
- Coordinator - New Rules of the Appellate Division 2018
- Presenter - "A Mockery of a Closing" 2018
- Mentor - "Trial Practicum" 2018
- Speaker - "Hot Topics in Foreclosure Appeals" 2018
- Coordinator - "Evidence Update" 2017
- Coordinator - "Witness Identification and Wrongful Conviction" 2017
- Moderator - "Unique Challenges When Perfecting Appeals to the Appellate Term" 2017
- Coordinator & Speaker "Bankruptcy Issues for Creditors' Attorneys" 2016
- Speaker "Foreclosure Boot Camp" 2014
- Speaker "Foreclosure Appeals" 2013
- Coordinator "Basics of Appellate Practice" 2013
- Speaker "Cloud Computing" 2013
- Coordinator "E-Discovery - Talk the Talk and Avoid Disaster" 2012
- Coordinator "Criminal Appeals from the District Court" 2012
- Coordinator "Foreclosure Defense Series part 1 - Answers & Settlement Conferences" 2011
- Coordinator "Foreclosure Defense Series part 2 - HAMP" 2011
- Coordinator & Speaker "Appeals from the Surrogate's Court" 2011
- Coordinator "Practice in the Appellate Division" 2011
- Speaker "Foreclosure Law & Procedure: Soup to Nuts" 2011

Publications:

- "Timing Rules Regarding Motions for Permission to Appeal to the New York State Court of Appeals" (The Suffolk Lawyer, September 2020)
- "Hot topics in Foreclosure Appeals" (The Suffolk Lawyer, May 2020)
- "Mock Trial - A Coordinator's View" (The Suffolk Lawyer, February 2020)
- "Appellate Practice Committee Holds Moot Court" (The Suffolk Lawyer, January 2020)
- "Warning signs from the Second Department" (The Suffolk Lawyer, December 2019)
- "Using Twitter as a Leadership Tool" (The Suffolk Lawyer, September 2019) "Hot
- Topics in Foreclosure Appeals" (The Suffolk Lawyer, January 2018)
- "Standing after *Aurora v Taylor*" (The Suffolk Lawyer, June 2016)
- "Are LegalZoom and Others Like It Illegal?" (The Suffolk Lawyer, November 2015) Special
- Section Editor for Technology (The Suffolk Lawyer, February 2015)
- "Avvo.com Ratings" (The Suffolk Lawyer, February 2015)
- "Practical Tips for Oral Argument" (The Suffolk Lawyer, October 2014)
- Special Section Editor for Technology (The Suffolk Lawyer, February 2014)
- "Adventures in 3d Printing" (The Suffolk Lawyer, February, 2014)
- "Useful Online Commercial Law Resources" (The Suffolk Lawyer, November 2013)
- "Emergency Applications To The Appellate Division, Second Department" (The Suffolk Lawyer, June 2013)
- "Veterans Need Our Help" (The Suffolk Lawyer, March 2013)
- "You Too Can Be A Power Searcher On Google" (The Suffolk Lawyer, December 2012)
- "Is Twitter for You?" (The Suffolk Lawyer, November 2012)
- "Predictive Coding - The New Frontier in Electronic Discovery" (The Suffolk Lawyer, October 2012) "What Google's New Privacy Policy Really Means" (The Suffolk Lawyer, April 2012)
- "Providing Understanding at Foreclosure Settlement Conferences" (The Suffolk Lawyer, June 2010)
- "Perils of Relying on Fair Use Exception" (The Suffolk Lawyer, March 2009) "Why Video Game Laws Are Unconstitutional" (The Suffolk Lawyer, April 2009)
- "Anonymous Bloggers, Defamation and Pre-Action Disclosure" (The Suffolk Lawyer, June 2009)
-
-

Teaching:

Adjunct Assistant Professor of Drama & Media Studies - Dowling College (2006-2015)
Lectured annually at Columbia University on topic of "Entertainment & Media Law" (2011-2020)

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- Lectured annually at Touro Law Center on topic of “Law Office Technology” (2012-2018)

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RPAPL 993 Uniform partition of heirs property act

Speaker:

Glenn P. Warmuth, Esq., Stim & Warmuth, P.C.

Timetable: 25 minutes

Outline:

- History of the Uniform partition of heirs property act
- A review of the provisions of RPAPL 993
- Discussion of case law
- Questions and answers

Materials:

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STATE OF NEW YORK

4865--A

2019-2020 Regular Sessions

IN SENATE

March 28, 2019

Introduced by Sens. HOYLMAN, MONTGOMERY, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property actions and proceedings law, in relation to establishing the uniform partition of heirs property act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The real property actions and proceedings law is amended by adding a new section 993 to read as follows:

§ 993. Uniform partition of heirs property act. 1. Short title. This section shall be known as the "uniform partition of heirs property act".

2. Definitions. For purposes of this section, the following terms shall have the following meanings:

(a) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from such other individual.

(b) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not such other individual's ascendant or descendant.

(c) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from such other such individual.

(d) "Determination of value" means a court order determining the fair market value of heirs property under subdivision six or ten of this section or adopting the valuation of the property agreed to by all co-tenants.

(e) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD10955-02-9

(ii) any of the co-tenants acquired title from a relative, whether living or deceased; and

(iii) any of the following applies:

(A) twenty percent or more of the interests are held by co-tenants who are relatives;

(B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;

(C) twenty percent or more of the co-tenants are relatives of each other; or

(D) any co-tenant who acquired title from a relative resides in the property.

(f) "Partition by sale" means a court-ordered sale of the entire heirs property, or the portion thereof in which any co-tenant who acquired title from a relative resides, whether by auction, sealed bids, or open-market sale conducted under subdivision ten of this section.

(g) "Partition in kind" means partition or division of heirs property into physically distinct and separately titled parcels.

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(i) "Relative" means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than under this section.

3. Applicability; relation to other law. (a) This section applies to partition actions filed on or after the effective date of this section.

(b) In any action to partition real property, the court shall determine, after notice and the right to be heard afforded to each party, whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record.

(c) This section shall supplement the general partition statute of this article and, if an action is governed by this section, shall replace the provisions of such general partition statute that are inconsistent with this section.

4. Service; notice by posting. (a) This section shall not limit or affect the method by which service of a complaint in a partition action may be made.

(b) If the plaintiff in a partition action seeks an order of notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than ten days after the court's determination, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action. The sign shall state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

5. Settlement conference. (a) In any partition action of heirs property, plaintiffs shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when a request for judicial intervention is filed, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties with respect to the subject property including, but not limited to, as set forth in this section.

(b) Upon the filing of a request for judicial intervention, the court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending. Plaintiff shall post a copy of the settlement conference notice in a conspicuous place on the property within twenty days of the date of the notice.

(c) The settlement conference may be adjourned or reconvened from time to time as appropriate during the pendency of the partition action. At any conference held pursuant to this section, the plaintiffs and the defendants shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the entirety or any portion of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant.

(d) At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall (i) advise the defendant of the requirement to answer the complaint, (ii) explain what is required to answer a complaint in court, (iii) advise that the ability to contest the partition action and assert defenses may be lost if an answer is not interposed, (iv) set a deadline for any co-tenants requesting partition by sale, and (v) provide information about available resources for legal assistance. A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule three hundred twenty of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived, within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

(e) Both the plaintiffs and defendants shall negotiate in good faith to reach a mutually agreeable resolution including, but not limited to, a tenancy in common agreement, a co-tenant buyout and the allocation, mechanics and financing thereof as provided in subdivision seven of this section, a partition in kind as provided in subdivisions eight and nine of this section, an open market sale as provided in subdivision ten of this section, or any other agreement or loss mitigation that is fair and reasonable considering the totality of factors listed in paragraph (a) of subdivision nine of this section.

(f) If the parties do not reach a mutually agreeable resolution, the referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process shall make a report of findings of fact, conclusions of law and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to paragraph (e) of this subdivision. If the court determines a plaintiff has failed to negotiate in good faith, the partition action shall be dismissed.

(g) Any motions submitted by any party to the action may be held in abeyance while the settlement conference process is ongoing, except for motions concerning (i) a determination of the percentage interests, if any, owned by any alleged co-tenant if such interests are in dispute and (ii) compliance with this rule and its implementing rules including

applications to extend in the interests of justice any deadlines fixed herein.

(h) In addition to any other qualifications otherwise required, each commissioner appointed under section nine hundred fifteen of this article and any officer appointed to conduct a sale shall be disinterested, impartial and not related to a party to or participant in the action.

6. Determination of value. (a) If the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the heirs property for purposes of subdivision seven of this section as follows, utilizing paragraph (d) of this subdivision, unless it has determined that paragraph (b) or (c) of this subdivision apply.

(b) If all co-tenants have agreed to the value of the property or to another method of valuation, the court shall adopt such value or the value produced by the agreed method of valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice of the value to the parties.

(d) If paragraph (b) or (c) of this subdivision do not apply, the court shall order an appraisal by a disinterested real estate appraiser licensed in this state to determine the fair market value of the property. Any determination of value under paragraph (c), (d), (f) or (g) of this subdivision shall assume sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) Not later than ten days after an appraisal is filed under paragraph (d) of this subdivision, the court shall send notice to each party with a known address, stating:

(i) the appraised fair market value of the property plus the allowed cost of the appraisal;

(ii) that the appraisal is available at the clerk's office; and

(iii) that a party may file with the court an objection to the appraisal not later than thirty days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to paragraph (d) of this subdivision, the court shall conduct a hearing to determine the fair market value of the property not sooner than thirty days after a copy of the notice of the appraisal is sent to each party under paragraph (e) of this subdivision, whether or not an objection to the appraisal is filed under subparagraph (iii) of paragraph (e) of this subdivision. In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under paragraph (f) of this subdivision, but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

7. Co-tenant buyout. (a) Every co-tenant who requests or joins a request for partition of heirs property by sale has thereby agreed that his or her interest may be acquired in accordance herewith at the value determined under subdivision six of this section by the co-tenants who have not sought or joined in the request for partition by sale. Upon determination that the property is heirs property and prior to the determination of value under subdivision six of this section, the court shall send notice to all parties identifying the owners of interests that have sought partition by sale, the percentage interests such owners

allege to hold and of the right of the remaining co-tenants to avert partition by sale by exercising the right to purchase all of the interests of the co-tenants who requested partition by sale.

(b) Not later than forty-five days after the notice of the determination of value under subdivision six of this section is sent and by the date specified in such notice, any co-tenant, except a co-tenant that requested partition by sale, may give notice to the court of the total amount of percentage interests subject to purchase that he or she elects to buy; provided, however, the court shall make a determination of each co-tenant's percentage ownership interest in the property prior to sending notice of the determination of value if such interest is in dispute and shall consider all facts as determined by the court and presented by the parties, and all laws and rules that govern the transfer, succession and acquisition of title through probate, intestacy or otherwise.

(c) The purchase price for percentage interests shall be the value of the entire parcel determined under subdivision six of this section multiplied by the aggregate amount of the percentage interests subject to purchase.

(d) After expiration of the period in paragraph (b) of this subdivision, the following rules apply:

(i) If one or more co-tenants have elected in the aggregate to buy at least the total amount of percentage interests subject to purchase, the court shall notify all the parties of such fact.

(ii) If the electing co-tenants' offers equal or exceed the amount of percentage interests subject to purchase, the court shall allocate the right to buy those interests among the electing co-tenants based on each electing co-tenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all co-tenants electing to buy, reserving priority, first, to electing co-tenants who acquired the interest from a relative and reside in the property and, second, to all other electing co-tenants who acquired their interest from a relative, and send notice to all the parties of the foregoing and of the price to be paid by each electing co-tenant.

(iii) If co-tenants with the right to elect fail to elect to purchase the entirety of the interests of the co-tenants whose interests are subject to purchase, the court shall send notice to all the parties of such fact and resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section.

(e) If the court sends notice to the parties under subparagraph (i) or (ii) of paragraph (d) of this subdivision, the court shall set a date, not sooner than sixty days after the date the notice was sent, by which electing co-tenants must pay their apportioned price into the court. After this date, the following rules apply:

(i) If all electing co-tenants timely pay his or her apportioned price to the court, the court shall issue an order reallocating all the interests of the co-tenants and disburse the amounts held by the court to the persons entitled to them.

(ii) If no electing co-tenant timely pays his or her apportioned price, the court shall resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section as if the interests of the co-tenants that requested partition by sale were not purchased.

(iii) If one or more, but not all, of the electing co-tenants fail to pay their apportioned price on time, the court, on motion, shall give notice to the electing co-tenants that paid their apportioned price of percentage of the unpurchased interests remaining and the price for all such interests.

(f) Not later than twenty days after the court gives notice pursuant to subparagraph (iii) of paragraph (e) of this subdivision, any co-tenant that paid his or her apportioned price may elect to purchase all of the remaining interest by paying the entire price to the court. After the twenty day period, the following rules shall apply:

(i) If only one co-tenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to such co-tenant. The court shall issue promptly an order reallocating the interests of all of the co-tenants and disburse the amounts held by the court to the persons entitled to such amounts.

(ii) If no co-tenant pays the entire price for the remaining interest, the court shall resolve the partition action under paragraphs (a) and (b) of subdivision eight of this section as if the interests of the co-tenants that requested partition by sale were not purchased.

(iii) If more than one co-tenant pays the entire price for the remaining interest, the court shall reapportion those remaining interests among those paying co-tenants, based on each paying co-tenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all co-tenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the co-tenants' interests, disburse the amounts held by the court to the persons entitled to such amounts, and promptly refund any excess payment held by the court.

(g) Not later than forty-five days after the court sends notice to the parties pursuant to paragraph (a) of this subdivision, any co-tenant entitled to buy an interest under this subdivision may request the court to authorize the sale as part of the pending action of the interests of co-tenants named as defendants and served with the complaint but that did not appear in the action.

(h) If the court receives a timely request under paragraph (g) of this subdivision, the court, after a hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(i) a sale authorized under this subdivision may occur only after the purchase prices for all interests subject to sale under paragraphs (a), (b), (c), (d), (e) and (f) of this subdivision have been paid to the court and such interests have been reallocated among the co-tenants as provided in such paragraphs; and

(ii) the purchase price for the interest of a non-appearing co-tenant is based on the court's determination of value under subdivision six of this section.

8. Partition alternatives. (a) If all the interests of all co-tenants that requested partition by sale are not purchased by other co-tenants pursuant to subdivision seven of this section, or if after conclusion of the buyout under subdivision seven of this section, a co-tenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in subdivision nine of this section, finds that partition in kind will result in great manifest prejudice to the co-tenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(b) If the court does not order partition in kind under paragraph (a) of this subdivision, the court shall order partition by sale pursuant to subdivision ten of this section provided that, if no co-tenant timely requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to paragraph (a) of this subdivision, the court may require that one or more co-tenants pay one or more other co-tenants amounts so that the payments, taken together with the value of the in kind distributions to the co-tenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, the court shall allocate to the co-tenants that are unknown, cannot be located, or the subject of a default judgment, if the co-tenants interests were not bought out pursuant to subdivision seven of this section, a part of the property representing the combined interests of such co-tenants as determined by the court and such part of the property shall remain undivided.

9. Considerations for partition in kind. (a) In determining under subdivision eight of this section whether partition in kind would result in great manifest prejudice to the co-tenants as a group, the court shall consider the following:

(i) whether the heirs property practicably can be divided among the co-tenants;

(ii) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the amount reasonably expected to be realized if the property were sold as a whole, taking into account the conditions under which a court-ordered sale likely would occur;

(iii) evidence of the collective duration of ownership or possession of the property by a co-tenant and one or more predecessors in title or predecessors in possession to the co-tenant who are or were relatives of the co-tenant or each other;

(iv) a co-tenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the co-tenant;

(v) the lawful use being made of the property by a resident or other co-tenant and the degree to which any such co-tenant would be harmed if the co-tenant could not continue the same use of the property;

(vi) the degree to which the co-tenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property;

(vii) the price, terms and conditions of the acquisition of the co-tenant's interest in the property if such co-tenant is not a relative of the person from whom it acquired his or her interest; and

(viii) any other relevant factor.

(b) The court shall not consider any one factor in paragraph (a) of this subdivision to be dispositive without weighing the totality of all relevant factors and circumstances.

10. Open-market sale, sealed bids, or auction. (a) If the court orders a sale of heirs property, notwithstanding section two hundred thirty-one of this chapter, such sale shall be an open-market sale under this subdivision unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the co-tenants as a group.

(b) If the court orders an open-market sale and the parties, not later than ten days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinter-

ested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the broker appointed under paragraph (b) of this subdivision obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(i) the broker shall comply with the reporting requirements in subdivision eleven of this section; and

(ii) the sale may be completed in accordance with the laws of this state other than this section.

(d) If the broker appointed under paragraph (b) of this subdivision does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after a hearing, may:

(i) order that the property continue to be offered for an additional time, by the same or a substitute broker, in accordance with paragraph (b) of this subdivision; or

(ii) if it determines that doing so would not be in the best interests of the parties, approve the highest outstanding offer.

(e) If after the court has appointed a substitute broker and there are no reasonable offers for the property, the court may order the property be sold by sealed bids or an auction and, the court shall set terms and conditions of the sale. If the court orders an auction, the auction shall be conducted in accordance with section two hundred thirty-one of this chapter.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the net proceeds.

11. Report of open-market sale. (a) Unless required to do so within a shorter time by this article, a broker appointed under paragraph (b) of subdivision ten of this section to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under subdivision six or ten of this section.

(b) The report required by paragraph (a) of this subdivision shall contain the following information:

(i) a description of the property to be sold to each buyer;

(ii) the name of each buyer;

(iii) the proposed purchase price;

(iv) the terms and conditions of the proposed sale, including the terms of any owner financing;

(v) the amounts to be paid to lienholders;

(vi) a statement of contractual or other arrangements or conditions of the broker's commission; and

(vii) other material facts relevant to the sale.

§ 2. This act shall take effect immediately.

[*1]

Pachter v 3063 Brighton 8 Props. LLC
2020 NY Slip Op 51108(U) [69 Misc 3d 1201(A)]
Decided on September 29, 2020
Supreme Court, Kings County
Fisher, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on September 29, 2020

Supreme Court, Kings County

Rena Pachter and CARMI LINDENBERG, Plaintiffs,

against

3063 Brighton 8 Properties LLC, Defendant.

518321/2019

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Pamela L. Fisher, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion/Order to Show Cause and

Affidavits (Affirmations) and Memoranda of Law Annexed 1-3, 4-6

Opposing Affidavits (Affirmations) and Memoranda of Law 5-6, 7-8

Reply Affidavits (Affirmations) and Memoranda of Law 7-8, 9

Upon the foregoing papers, plaintiffs move in motion sequence 3, for an order, pursuant to CPLR § 3212, granting them summary judgment on their amended complaint. Plaintiffs also move, pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3211(b), for an order dismissing defendant's counterclaim and affirmative defenses asserted in their second amended answer with prejudice. As an alternative to dismissal, plaintiffs move to sever defendant's counterclaim.

Defendant moves in motion sequence 4 (cross motion), for an order, granting defendant leave to serve an amended answer pursuant to CPLR § 3025(b). Upon leave being granted, pursuant to RPAPL § 993(3)(b), defendant moves for an order finding that the real property that is the subject of this action for partition (2169 Coney Island Avenue, Brooklyn, NY (Block 6817, Lot 68)) (hereinafter "property") constitutes "heirs property." Defendant also moves, pursuant to RPAPL § 993(7)(a), for an order notifying all parties of plaintiffs' one-third interest in the property, and of defendant's right of first refusal to plaintiffs' partition by sale. Defendant moves, pursuant to RPAPL § 993(5), for an order notifying the parties of the time and date of a settlement conference, the purpose of the conference, and the requirements of RPAPL § 993.

Background

Plaintiffs commenced this action to partition real property located at 2169 Coney

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Island Avenue, Brooklyn, NY on August 19, 2019 (Summons & Complaint, NYSCEF No.1). Ms. Judith Lindenberg, owner of one-third of the property passed away on May 8, 2018 (Amended Complaint ¶ 8, annexed as exhibit A to plaintiffs' motion papers). Plaintiffs are Ms. Lindenberg's brother and sister, and defendant is a part-owner of the property (*Id.* at ¶ 13, 27). The original complaint indicates that plaintiffs inherited decedent's interest in the property pursuant to her last will and testament (Complaint ¶ 12). On November 13, 2019, the Queens County Surrogate's Court revoked Judith Lindenberg's will (Queens County Surrogate's Court Order dated November 13, 2019, Exhibit I to plaintiffs' motion papers). On January 22, 2020, the Court granted plaintiffs' motion for leave to amend their complaint pursuant to CPLR § 3025(b) to delete any reference to a will, indicating that the laws of intestate succession govern whether the plaintiffs have any interest in the property (NYSCEF #28). The amended complaint states that upon her death, Ms. Lindenberg's interest in the property "vested by operation of law upon plaintiffs equally" (Amended Complaint ¶ 20; *see also* EPTL § 4-1.1(a)(5)). The amended complaint contains three causes of action: (1) for a declaratory judgment that the plaintiffs are "jointly 1/3 owners of the property as tenants-in-common," (2) for partition and sale of the property, and (3) for an equitable accounting (Amended Complaint at 4-5). Defendant filed an answer claiming that it lacked knowledge as to whether the plaintiffs hold an interest in the property, and defendant also included affirmative defenses and a counterclaim for prima facie tort alleging that plaintiffs knew that the former executor was attempting to probate a fraudulent will (Answer to Amended Complaint with Counterclaim ¶¶ 8, 59, annexed as exhibit F to plaintiffs' motion papers). In its proposed amended answer, defendant has removed most of its affirmative defenses, but has added affirmative defenses for unclean hands, for contribution, set-off, and recoupment, and that the relief is barred by RPAPL § 993 (Proposed Amended Answer to Amended Complaint with Counterclaim ¶¶ 22-24, annexed as exhibit A to defendant's motion papers). Defendant's proposed amended answer also includes the counterclaim from the previous [*2]answer but does not label it as a prima facie tort (*Id.* at ¶¶ 25-55).

Parties' Contentions

In support of their motion for summary judgment, plaintiffs contend that there are no

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material issues of fact (Plaintiffs' Memorandum of Law in Support at 4). Plaintiffs point out that David Winiarski, the sole member of 3063 Brighton 8 Properties LLC admitted Ms. Lindenberg's ownership interest in the property in a sworn statement in the Surrogate's Court action, and that this statement is binding on the LLC (*Id.* at 6). Plaintiffs maintain that the property passed by operation of law to them, since they were decedent's sole heirs, and that a physical partition of the property would prejudice their rights, because the property has been improved by a mixed-use structure (*Id.* at 6-7). In support of their motion to dismiss the counterclaim and affirmative defenses, plaintiffs allege that defendant's counterclaim for prima facie tort is "categorically precluded," since it pleads injury from legal proceedings, and the counterclaim is also deficient, since defendants have failed to allege all of the required elements (*Id.* at 12, 13-16). Plaintiffs maintain that defendant's affirmative defenses lack merit (*Id.* at 18).

In opposition to plaintiffs' motion for summary judgment, and in support of its cross motion to amend defendant's answer, defendant alleges that plaintiffs cannot demonstrate any prejudice that would result from its proposed amendments to plead that the action is subject to RPAPL § 993, and to add the affirmative defense of unclean hands (Defendant's Memorandum of Law in Opposition at 8-9). Defendant contends that RPAPL § 993 is clearly applicable to this partition action, as the property "is held (i) by tenants in common with no agreement binding all co-tenants in the event of partition, (ii) by at least one co-tenant who acquired title from a relative, and (iii) 20% or more of the interests are held by co-tenants who are relatives" (*Id.* at 13). Defendant maintains that if RPAPL § 993 is inapplicable, plaintiffs' unclean hands "bar the equitable remedy of partition" (*Id*. at 16). Defendant also argues that plaintiffs' complaint should be dismissed since its verification was defective (*Id.* at 19).

In reply to defendant's opposition to plaintiffs' motion for summary judgment, and in opposition to defendant's motion to amend its answer, plaintiffs reiterate that summary judgment should be granted, as there are no material issues of fact (Plaintiffs' Reply Memorandum of Law at 2). Plaintiffs maintain that the counterclaim for prima facie tort should be dismissed, as defendant has failed to oppose this portion of the motion (*Id.* at 2-3). Regarding defendant's motion to amend to add the affirmative defense of unclean hands, and to apply RPAPL § 993 to this action, plaintiffs argue that defendant should not be allowed to add an affirmative defense for unclean hands since the allegations in their

answer concern non-parties and are based on Judith Lindenberg's will (*Id.* at 6, 8) . Plaintiffs claim that RPAPL § 993 is inapplicable to this action, because it was enacted on December 6, 2019, after this action was commenced (*Id.* at 3). Plaintiffs dispute that the complaint was not properly verified (*Id.* at 10).

In reply, defendant maintains that RPAPL § 993 applies to this action, stating that the action was commenced by the filing of the amended complaint on January 22, 2020, after the effective date of the statute (Defendant's Affirmation in Reply ¶¶ 4, 5). Defendant indicates that RPAPL § 993 should be applied retroactively, because the statute is remedial in nature (*Id.* at ¶ 10).

Law

Summary Judgment

A party moving for summary judgment bears the burden of establishing a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to adhere to this standard results in a denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish a material factual issue requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). Courts must view the totality of evidence presented in the light most favorable to opposing parties and afford them the benefit of every favorable inference (*see Fortune v Raritan Bldg. Servs. Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Partition

A party who jointly owns property with another may "seek physical partition of the

property or partition and sale when he or she no longer wishes to jointly use or own the property" (RPAPL § 901(1); *Manganiello v. Lipman*, 74 AD3d 667, 668 [1st Dept. 2010]). A court has discretion when determining whether partition is an appropriate remedy, and must consider the equities between the parties, as well as whether a physical partition would cause prejudice (*Id.*; *Lauriello v. Gallotta*, 70 AD3d 1009, 1010 [2d. Dept. 2010]). To allege a cause of action for partition, a party must plead: "(1) that the parties own the building as tenants in common and (2) that physical partition of the property would come at great prejudice to the owners" (*MurrayRayeDebbie, LLC v. Rosenphil LLC*, 172 AD3d 615, 615 [1st. Dept. 2019]). An accounting is "a necessary incident of almost every partition action and is had as a matter of right before the entry of either the interlocutory or final judgment" (*Giglio v. Giglio*, 46 AD2d 921, 921 [2d. Dept. 1974]; *see also* RPAPL § 945, indicating that the "court may adjust the rights of a party as against any other party by reason of the receipt by the latter of more than his proper proportion of the rents or profits of a share").

Real Property Interests of Decedent

When a person who holds an interest in real property dies intestate, his interest in the real property automatically vests by operation of law upon his heirs as tenants in common (*Kraker v. Roll*, 100 AD2d 424, 429 [2d. Dept. 1984]).

Intestate Succession

Pursuant to New York Estates, Powers, and Trusts Law § 4-1.1, if a decedent dies intestate, his property is distributed to his spouse and issue (EPTL § 4-1.1(a)(1)). If the decedent has no issue, all of his property is distributed to his spouse (EPTL § 4-1.1(a)(2)). If the decedent has no spouse, then his issue takes all of his property (EPTL § 4-1.1(a)(3)). If the decedent's parents are alive, but he has no spouse, nor issue, then the decedent's parents inherit all of his property (EPTL § 4-1.1(a)(4)). If decedent's parents predecease him, and he has no spouse, nor issue, then the property is distributed to "the issue of decedent's parents by representation" (EPTL § 4-1.1(a)(5)).

Motion to Dismiss

A court may dismiss a counterclaim, if it "may not properly be interposed in the action" [*3](CPLR § 3211(a)(6)). Pursuant to CPLR § 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR § 3211(b)). On a motion to dismiss, pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must "liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici, v. Belkin BV*, 109 AD3d 520, 521 [2d. Dept 2013]). Pursuant to CPLR § 3211(a)(1), a motion to dismiss may be granted if the "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Leave to Amend Complaint

CPLR § 3025(b) provides that "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions, or occurrences, at any time by leave of court" (CPLR § 3025(b)). "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Pansini Stone Setting, Inc. v. Crow & Sutton Assoc., Inc.*, 46 AD3d 784, 786 [2d. Dept. 2007]).

Unclean Hands

"[U]nclean hands is a defense to the equitable remedy of partition" (*Kopsidas v. Krokos*, 294 AD2d 406, 407 [2d. Dept. 2002]). The defense applies when "the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Id.*).

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Uniform Partition of Heirs Property Act

The Uniform Partition of Heirs Property Act, effective December 6, 2019, defines "heirs property" as "real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action: (i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property; (ii) any of the co-tenants acquired title from a relative, whether living or deceased; and (iii) any of the following applies: (A) twenty percent or more of the interests are held by co-tenants who are relatives; (B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; (C) twenty percent or more of the co-tenants are relatives of each-other; or (D) any co-tenant who acquired title from a relative resides in the property" (RPAPL § 993(2)(e)). The text of the statute indicates that it applies to "partition actions filed on or after the effective date of this section" (RPAPL § 993(3)(a)). The Uniform Partition of Heirs Property Act requires that the co-tenants who have not consented to the partition be given notice of "the owners of interests that have sought partition by sale, the percentage interests such owners allege to hold and of the right of the remaining co-tenants to avert partition by sale by exercising the right to purchase all of the interests of the co-tenants who requested partition by sale" (RPAPL § 993(7)(b)). The statute also requires a settlement conference to take place, "for the purpose of holding settlement discussions, pertaining to the relative rights and obligations of the parties with respect to the subject property" (RPAPL § 993(5)(a)).

Commencement of an Action/ Effect of Amendment to Complaint

CPLR § 304(a) provides that "[a]n action is commenced by filing a summons and complaint or summons with notice" (CPLR § 304(a)). Pursuant to CPLR § 203(c), when an action is commenced by filing, "a claim asserted in that complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced" (CPLR § 203(c)). When a pleading is amended, the claims in the amended pleading are interposed when the claims in the original pleading were interposed, "unless the original pleading does not give notice of the transactions, occurrences, or series of

transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR § 203(f)).

Verification of Pleadings

Verification of a complaint is not mandatory (*See* CPLR § 3020; *Joseph Durst Corp. v. Leader*, 51 Misc 2d 72, 73 [Sup Ct, NY County 1966]).

Analysis

Plaintiffs' Motion for Summary Judgment

To evaluate whether plaintiffs are entitled to summary judgment, the court must determine whether there are any material issues of fact with respect to the elements of a partition cause of action, as well as whether defendant's current and proposed affirmative defenses and counterclaim have merit. The first issue is whether plaintiffs have sufficiently established their entitlement to partition. In their amended complaint, plaintiffs have alleged the first element of a partition cause of action, that plaintiffs and the defendant are tenants in common (Amended Complaint ¶ 30). There is no issue of fact with respect to plaintiffs' ownership interest in the property. Defendant's principal, David Winiarski, the sole member of the LLC, admitted the decedent's ownership interest in the property in the Surrogate's Court action, and this admission is binding on the LLC (Amended and Restated Answers and Objections to Petitioner's First Interrogatories at 10, Exhibit B to plaintiffs' motion papers; *New Greenwich Litig. Trustee, LLC v. Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 25 [1st Dept. 2016]; *Morgenthow & Latham v. Bank of NY Co.*, 305 AD2d 74, 79-80 [1st Dept. 2003]). In this action, the defendant has attested to the truth of Mr. Winiarski's prior admissions (Notice to Admit at 2, Exhibit C to plaintiffs' motion papers; Response to Plaintiff's Notice to Admit at 2, Exhibit D to defendant's motion papers). Since the Surrogate's Court invalidated the will, the laws of intestate succession govern who owns decedent's property upon her death (Queens County Surrogate's Court Order dated November 13, 2019). The affidavit of heirship from plaintiff Rena Pachter's husband, submitted by plaintiffs in support of their motion, affirms that plaintiffs are decedent's sole

heirs, since decedent was never married, had no children, and her parents predeceased her (Affidavit of Heirship ¶¶ 4-8, Exhibit E to plaintiffs' motion papers). Decedent's real property passed to her siblings automatically upon her death (EPTL § 4-1.1(a)(5); *Kraker*, 100 AD2d at 429). Although plaintiffs have not provided death certificates for their parents, the defendant does not dispute that plaintiffs are decedent's sole heirs and that they hold a one-third interest in the property (Defendant's Affirmation in Opposition ¶ 12). Therefore, plaintiffs have sufficiently established the first element of their partition cause of action, as well as their entitlement to judgment as a matter of law with respect to their first cause of action for a declaratory judgment that plaintiffs are "jointly 1/3 owners of the Property as tenants-in common" (Amended Complaint ¶ 36).

Plaintiffs have also sufficiently established the second element of their partition cause of action, since they have presented evidence that the property has been improved by a mixed-use [*4]structure (Certificate of Occupancy, Exhibit G to plaintiffs' motion papers, indicating that there is an apartment on the premises, as well as a daycare center), and this type of property cannot be divided without prejudicing the parties (*Hitech Homes*, *LLC v. Burke*, 159 AD3d 489, 489 [1st Dept. 2018]; *Estate of Steingart v. Hoffman*, 33 AD3d 465, 466 [1st Dept. 2006]; *Ferguson v. McLoughlin*, 184 AD2d 294, 295 [1st Dept. 1992]). Defendant, in opposition has not contested these facts. Therefore, unless defendant's affirmative defenses and counterclaim have merit, plaintiffs are entitled to summary judgment on their second cause of action for partition and sale. If the court grants summary judgment on plaintiffs' cause of action for partition, as a matter of law, the court must grant summary judgment on plaintiffs' third cause of action for an equitable accounting (*Giglio*, 46 AD2d at 921) (holding that an accounting is a "necessary incident of almost every partition action")).

Dismissal of Counterclaim and Affirmative Defenses

In support of their motion for summary judgment, plaintiffs maintain that defendant's affirmative defenses and counterclaim for prima facie tort lack merit (Plaintiffs' Memorandum of Law in Support at 11-12, 18). Defendant in its cross motion for leave to amend its answer has submitted a proposed amended answer that has removed most of its

affirmative defenses, as well as any reference to "prima facie tort" in its counterclaim (Proposed Amended Answer to Amended Complaint with Counterclaim ¶¶ 16-25). The sole remaining affirmative defenses include that plaintiffs' claims are barred by documentary evidence, defendant has provided plaintiff with the requested accounting, the verification in plaintiff's complaint is defective, plaintiffs' cause of action is barred by the doctrine of unclean hands (proposed amendment to answer), defendant has a right to reimbursement among co-tenants for money it spent on improving and maintaining the premises (proposed amendment), and RPAPL § 993 is applicable to plaintiffs' cause of action (proposed amendment) (*Id.* at ¶¶ 16-24). Excluding its affirmative defense for improper verification, defendant has failed to oppose plaintiffs' motion to dismiss the affirmative defenses in its current answer, so the affirmative defenses for documentary evidence and accounting are dismissed with prejudice (*See Kronick v. L.P. Thebault Co.*, 70 AD3d 648, 649 [2d. Dept. 2010] (indicating that plaintiff abandoned claim by "failing to oppose the branch of the defendant's motion which was to dismiss it"); *Genovese v. Gambino*, 309 AD2d 832, 833 [2d. Dept. 2003]). Defendant has also failed to oppose the dismissal of its counterclaim for prima facie tort, but defendant, in support of its cross motion to amend its answer states that the counterclaim establishes plaintiffs' unclean hands (Defendant's Memorandum of Law in Opposition at 17). Therefore, whether the counterclaim should be dismissed will be discussed in conjunction with defendant's motion for leave to amend its answer.

Defendant's Cross Motion for Leave to Serve an Amended Answer

Defendant's cross motion for leave to serve an amended answer is denied, as the three proposed affirmative defenses (unclean hands, recoupment of costs, and RPAPL § 993) lack merit, will be addressed during the accounting, or are clearly inapplicable to plaintiffs' cause of action. Defendant's counterclaim does not establish that plaintiffs had "unclean hands." The equitable defense of unclean hands requires the complaining party to plead that (1) "the offending party is guilty of immoral, unconscionable conduct," (2) that "the conduct relied on is directly related to the subject matter in litigation," and (3) the complaining party was injured by the conduct (*Kopsidas*, 294 AD2d at 407). In its counterclaim, defendant alleges that the will [*5]offered to the Surrogate's Court for

probate was fraudulent, in that the notary backdated the will, and the decedent's nephew was listed as her executor, instead of her brother, who was named executor in the law firm's copy of the will (Proposed Amended Complaint ¶¶ 29, 35, 39). Defendant further alleges plaintiffs knew that the will that was admitted into probate was fraudulent, and defendant is claiming that it sustained damages in the form of legal fees from defending this and other actions based on the will, and that the notice of pendency filed on the property has disrupted defendant's business (*Id.* at ¶¶ 42, 45, 49, 51, 52). Although defendant may be able to establish the first element of the unclean hands defense, since defendant is claiming that the plaintiffs knew that the will was fraudulent, defendant has failed to plead the second and third elements. The conduct of admitting a fraudulent will into probate has no bearing on this partition action, since the will merely changed the executor, and the beneficiaries under the will are the same as decedent's intestate heirs. Therefore, the plaintiffs would have a one-third interest in the property, regardless of whether the will was valid. Defendant has also failed to establish that it suffered an injury, since the executor of the will has no effect on defendant since it was not a beneficiary under the will, and a notice of pendency was filed due to the partition action, based on plaintiffs' one-third interest in the property, which is unrelated to the validity of the will. Therefore, since the unclean hands defense has no merit in this case, the court will not grant defendant leave to amend its answer to plead it. Also, taking all the allegations in the counterclaim as true, defendant has failed to plead a cause of action for unclean hands, and therefore, the counterclaim is dismissed.

The court also declines to allow the defendant leave to amend its answer to assert an affirmative defense based on recoupment of costs associated with improving, repairing, and maintaining the premises, since these costs will be taken into account during the accounting (*See* RPAPL § 945; *Manganiello*, 74 AD3d at 669) (indicating that an accounting is necessary since defendant claims that she "has solely contributed to [the property's] maintenance and upkeep).

Defendant's motion for leave to amend its answer, to add an affirmative defense claiming that the Uniform Partition of Heirs Property Act (RPAPL § 993) is applicable to plaintiffs' partition cause of action, is denied. The statute clearly states that it is effective as of December 6, 2019, and it "applies to partition actions filed on or after [December 6, 2019]" (RPAPL § 993(3)(a)). Defendant claims that the action was commenced when the

amended complaint was filed on January 22, 2020 (Defendant's Affirmation in Reply ¶¶ 4, 5). However, plaintiff disagrees, indicating that the action was commenced on August 19, 2019, when the original complaint was filed (Plaintiffs' Reply Memorandum of Law at 3). CPLR § 304(a) states that an action is commenced by the filing of a summons and complaint (CPLR § 304(a)). CPLR § 203(f) indicates that claims in an amended complaint are "interposed" when the original complaint was filed, as long as the original complaint "give[s] notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended [complaint]" (CPLR § 203(f)). The only difference between the original and amended complaint concerns the status of the plaintiffs as beneficiaries under the will in the original complaint, as opposed to intestate heirs in the amended complaint. The amendment is not material, since the amendment has no effect on the plaintiffs' right to partition the property. Therefore, the amended complaint has no effect on the date the action was commenced (*See also Valladares v. Valladares*, 55 NY2d 388, 391 [1982], indicating that the action was commenced as of the service of the original [*6]complaint). Since the action was commenced on August 19, 2019, the Uniform Partition of Heirs Property Act does not apply to this action.

The cases defendant cites in support of his contention that the action was commenced by the filing of the amended complaint are distinguishable. *Perez v. Paramount Communications*, 92 NY2d 749 [1999], concerned whether the filing of a motion for leave to amend a complaint to add a defendant tolled the statute of limitations. This case does not involve adding additional parties. *Schlapa v. Consolidated Edison Co. of NY, Inc.*, 174 AD3d 934 [2d. Dept. 2019], also involves the issue of adding additional defendants, indicating that the action was commenced against the additional defendants when the plaintiff "filed the supplemental summons and amended complaint with the Queens County Clerk's Office" (*Id.* at 935). *Long v. Sowande*, 27 AD3d 247 [1st Dept. 2006], can also be differentiated, as the issue in that case was whether cross claims by newly added defendants were time-barred. Therefore, this action was commenced by the filing of the initial complaint on August 19, 2019. Although defendant argues that the statute should be applied retroactively, when a statute clearly states that it applies to actions commenced after its effective date, retroactive application is precluded (*Golston-Green v. City of New York*, 184 AD3d 24, 24 n.1 [2d. Dept. 2020]).

GPW 21

Improper Verification of Complaint

Defendant's affirmative defense that plaintiffs' complaint was improperly verified by an attorney should be dismissed with prejudice. Defendant, in its opposition papers, claims that plaintiffs' complaint was improperly verified by an attorney, pursuant to CPLR § 3020(d), because plaintiff Rena Pachter resides in New York County, the county in which plaintiffs' attorney is located (Defendant's Memorandum of Law in Opposition at 18-19). Plaintiffs, in opposition, dispute that plaintiff Rena Pachter resides in New York County, but maintain that even if the complaint were improperly verified, dismissal of this action would be inappropriate, since verification of a complaint is optional (Plaintiffs' Memorandum of Law in Reply at 10; CPLR § 3020; *Joseph Durst Corp*., 51 Misc 2d at 73 (stating that verification of a complaint is optional); *Shawn M.M. v. Jasmine L.L.*, 180 AD3d 1186, 1187 [3d. Dept. 2020] (holding that dismissal was not necessary where a petition was not verified, since verification was optional)). Therefore, this affirmative defense should be dismissed with prejudice, since it does not preclude summary judgment.

Conclusion

Plaintiffs' motion for summary judgment is granted. Plaintiffs' motion to dismiss defendant's counterclaim and affirmative defenses with prejudice is also granted. Defendant's cross motion is denied in its entirety. This matter is referred to a referee to conduct an accounting and sale of the property.

This constitutes the decision and order of the Court.

E N T E R:
Hon. Pamela L. Fisher
J.S.C.

Return to Decision List

GPW 22

Board of Mgrs. of the One Sunset Park Condominium v Wong
2021 NY Slip Op 30615(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 508641/2020
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
----------X

BOARD OF MANAGERS OF THE ONE SUNSET PARK CONDOMINIUM,

Plaintiff,

-against-

WILSON WONG, ET AL,

Defendants.
----------X

DECISION / ORDER

Index No. 508641/2020

Motion Seq. # 1

Recitation, as required by CPLR 2219(a) of the papers considered in the review of plaintiff's motion for summary judgment in this partition action

Papers	**NYSCEF Doc,**
Notice of Motion, Affirmations, Affidavits and Exhibits…….	55-68
Answering Affidavits…….	73-83, 86
Reply Affidavits…….	87

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff moves, in this partition action regarding a fifty-four-family multiple dwelling in Brooklyn, NY, converted in 2009 to a condominium, for summary judgment pursuant to Real Property Law Section 339-cc (the Condominium Act section titled "Repair or Reconstruction") and for related relief. After oral argument, held virtually on Microsoft Teams, the motion is granted solely to the extent that the court hereby grants plaintiff summary judgment and issues this order appointing a Referee to ascertain the parties' rights and interests, as is required prior to a motion to confirm/reject coupled with an application for an interlocutory judgment to sell, and for a determination of whether there are any liens or judgments on the property or against

the parties.

The court finds that the plaintiff has obtained jurisdiction over all of the condominium unit owners, who are all named defendants, and that all of the named defendants have appeared and answered the complaint, that plaintiff has established, as required by RPL §339-cc, that three-fourths or more of the building has been destroyed by fire, and that seventy-five percent or more of the unit owners do not want to repair or restore, which was determined by a vote duly held pursuant to the By-laws, that the plaintiff condominium board is the owner of the superintendent's unit, and as such is a unit owner eligible to bring this partition action, and that a Referee should be appointed to determine the rights and obligations of the parties.

Upon the foregoing papers, and on motion of Herrick, Feinstein, attorneys for plaintiff, which came on to be heard on March 1, 2021, and there being no opposition to the motion, the attorneys for the defendant who is the holder of unsold units having filed an affirmation in support, and the attorneys for the other unit owners having only opposed the branch of the motion which seeks to dismiss their counterclaims, it is hereby **ORDERED** that:

1. Plaintiff is granted summary judgment as against all defendants on their claim for partition.

2. Jeffrey Saltiel, Esq., with offices at Wenig, Saltiel LLP, 26 Court Street, Suite 1200, Brooklyn, NY 11242, 718-797-5700, jsaltiel@ltattorneys.com is appointed Referee in this action, to ascertain and report the rights, shares and interests of the

parties to this action in the property described in the complaint and of which partition is sought, and to take proof of the parties' title and interest in the premises and of the matters set forth in the complaint, and to report whether the property, or any part of the property, is so circumstanced as to require a sale, and whether a partition of the property can be made without great prejudice to the owners.

3. If the Referee concludes that a sale of the property is necessary and appropriate, then the Referee shall secure a lien search and ascertain whether there is any creditor, not a party to the action, who has a lien on the subject property or in the undivided share or interest of any party in the property previously described.

4. The Referee shall prepare a list of the fifty-four apartments, with the names of the unit owners indicated and the names and addresses of the holders of any liens, including mortgages, on the units. Account numbers, if included, shall only include the last four digits. The list of units from the Declaration of Condominium is annexed hereto, which lists the unit numbers and the tax lot numbers.

5. The Referee shall determine whether this partition action should proceed under New York's partition law at RPAPL §901 et seq., or the new NY law recently adopted and adapted from the Commission on Uniform Laws, at RPAPL §993 et seq. Counsel at oral argument indicated they might be able to obtain a stipulation to proceed under the new law, which permits a sale without an auction at the courthouse.

6. The Referee shall report to the court the name of each creditor whose lien is satisfactorily proved before him (or her), the nature and extent of the lien, the date of

the lien and the (approximate) amount due or to become due on each of the liens.

7. The Referee shall make his/her report (by E-Filing same) no later than 90 days from the date of this order, and except for good cause shown, the Plaintiff shall move to confirm the Referee's report and for an interlocutory judgment to sell no later than 90 days from the date of the Referee's report.

8. With the submission of the Referee's Report, the Referee shall include an affirmation of services rendered so the court may award the Referee compensation for his/her services, which sum may be recovered by plaintiff as a cost of litigation.

9. The Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall notify the Appointing Judge forthwith.

10. By accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, Section 36.2(e) ("Disqualifications from appointment"), and Section 36.2(d) ("Limitations on appointments based upon compensation").

The branch of the plaintiff's motion which seeks an order dismissing the unit owner defendants' counterclaims (not asserted by the defendant 4401 Sunset Holdings LLC, the holder of unsold units) is denied with regard to the first counterclaim (for an accounting), and granted with regard to the second counterclaim (for a declaratory judgment of the rights of the parties, as it is duplicative of the relief

required of the court in a partition action) .

Accordingly, it is **ORDERED** that the defendants' first counterclaim (for an accounting) is hereby severed and shall continue.

All other relief requested in the motion is denied.

As this action was improperly captioned with regard to the name of the plaintiff, which error is not fatal and may be corrected, it is **ORDERED** that the name of the plaintiff, in accordance with General Associations Law §12, is amended to be: "Leroy P. Shepherd, as President of the Board of Managers of the One Sunset Park Condominium."

This shall constitute the decision and order of the court.

Dated: March 1, 2021

E N T E R :

Hon. Debra Silber, J.S.C.

EXHIBIT B
TO THE DECLARATION OF

ONE SUNSET PARK CONDOMINIUM

702 44th Street, Brooklyn, NY 11220
Block 641 - Lots 1001-1054

DESCRIPTION OF THE UNITS

UNIT	NUMBER OF BEDROOMS/BATHS KITCHEN, STUDY	APPROXIMATE TOTAL SQ. FT. UNIT	APPROXIMATE TOTAL SQ. FT. BALCONY/ TERRACE	BLOCK TAX LOT NO.	% OF COMMON INTEREST	LOCATION IN PORTION OF BUILDING FACING DIRECTION SET FORTH BELOW	COMMON ELEMENTS TO WHICH THE UNIT HAS IMMEDIATE ACCESS
1A	1/1+K	878	n/a	741/1001	1.8689997	SW	corridor, elevator, stairs
2A	1/1 +K	878	n/a	741/1002	1.8689997	SW	corridor, elevator, stairs
3A	2/1	878	n/a	741/1003	1.8689997	SW	corridor, elevator, stairs
4A	1/1 +K	878	n/a	741/1004	1.8689997	SW	corridor, elevator, stairs
5A	1/1 +K	878	n/a	741/1005	1.8689997	SW	corridor, elevator, stairs
6A	1/1 +K	878	n/a	741/1006	1.8689997	SW	corridor, elevator, stairs
1B	2/1	860	n/a	741/1007	1.8306831	SW	corridor, elevator, stairs
2B	2/1	860	n/a	741/1008	1.8306831	SW	corridor, elevator, stairs
3B	1/1 +K	860	n/a	741/1009	1.8306831	SW	corridor, elevator, stairs
4B	2/1	860	n/a	741/1010	1.8306831	SW	corridor, elevator, stairs
5B	1/1 +K	860	n/a	741/1011	1.8306831	SW	corridor, elevator, stairs
6B	1/1 +K	860	n/a	741/1012	1.8306831	SW	corridor, elevator, stairs
1C	1/1 +K	830	n/a	741/1013	1.7668221	W	corridor, elevator, stairs
2C	2/1	830	n/a	741/1014	1.7668221	W	corridor, elevator, stairs
3C	1/1 +K	830	n/a	741/1015	1.7668221	W	corridor, elevator, stairs
4C	1/1 +K	830	n/a	741/1016	1.7668221	W	corridor, elevator, stairs
5C	2/1	830	n/a	741/1017	1.7668221	W	corridor, elevator, stairs
6C	2/1	830	n/a	741/1018	1.7668221	W	corridor, elevator, stairs
1D	2/1	922	n/a	741/1019	1.9626626	NW	corridor, elevator, stairs
2D	2/1 +K	1,114	n/a	741/1020	2.3713732	NW	corridor, elevator, stairs
3D	2/1 +K	1,114	n/a	741/1021	2.3713732	NW	corridor, elevator, stairs
4D	2/1 +K	1,114	n/a	741/1022	2.3713732	NW	corridor, elevator, stairs
5D	2/1 +K	1,114	n/a	741/1023	2.3713732	NW	corridor, elevator, stairs
6D	2/1 +K	1,114	n/a	741/1024	2.3713732	NW	corridor, elevator, stairs
1E	1/1 +K	685	n/a	741/1025	1.4581604	NW	corridor, elevator, stairs
2E	1/1 +K	846	n/a	741/1026	1.8008813	NW	corridor, elevator, stairs
3E	1/1 +K	846	n/a	741/1027	1.8008813	NW	corridor, elevator, stairs
4E	1/1 +K	846	n/a	741/1028	1.8008813	NW	corridor, elevator, stairs
5E	2/1	846	n/a	741/1029	1.8008813	NW	corridor, elevator, stairs
6E	1/1 +K	846	n/a	741/1030	1.8008813	NW	corridor, elevator, stairs
1F	Studio/1+S	562	n/a	741/1031	1.1963301	NE	corridor, elevator, stairs
2F	1/1 +K	794	n/a	741/1032	1.6901888	NE	corridor, elevator, stairs
3F	1/1 +K	794	n/a	741/1033	1.6901888	NE	corridor, elevator, stairs
4F	1/1 +K	794	n/a	741/1034	1.6901888	NE	corridor, elevator, stairs
5F	1/1 +K	794	n/a	741/1035	1.6901888	NE	corridor, elevator, stairs
6F	2/1	794	n/a	741/1036	1.6901888	NE	corridor, elevator, stairs
1G	2/1 +K	1,059	n/a	741/1037	2.2542947	NE	corridor, elevator, stairs
2G	2/1 +K	1,059	n/a	741/1038	2.2542947	NE	corridor, elevator, stairs
3G	2/1 +K	1,059	n/a	741/1039	2.2542947	NE	corridor, elevator, stairs
4G	2/1 +K	1,059	n/a	741/1040	2.2542947	NE	corridor, elevator, stairs
5G	2/2+K+S	1,059	n/a	741/1041	2.2542947	NE	corridor, elevator, stairs
6G	2/1 +K	1,059	n/a	741/1042	2.2542947	NE	corridor, elevator, stairs
1H	1/1 +K	792	n/a	741/1043	1.6859314	SE	corridor, elevator, stairs
2H	1/1 +K	792	n/a	741/1044	1.6859314	SE	corridor, elevator, stairs
3H	1/1 +K	792	n/a	741/1045	1.6859314	SE	corridor, elevator, stairs
4H	2/1	901	n/a	741/1046	1.9179599	SE	corridor, elevator, stairs
5H	2/1	901	n/a	741/1047	1.9179599	SE	corridor, elevator, stairs
6H	2/1	901	n/a	741/1048	1.9179599	SE	corridor, elevator, stairs
1J	1/1 +K	754	n/a	741/1049	1.6050408	SE	corridor, elevator, stairs
2J	1/1 +K	754	n/a	741/1050	1.6050408	SE	corridor, elevator, stairs
3J	1/1 +S	754	n/a	741/1051	1.6050408	SE	corridor, elevator, stairs
4J	1/1	645	n/a	741/1052	1.3730123	SE	corridor, elevator, stairs
5J	1/1	645	n/a	741/1053	1.3730123	SE	corridor, elevator, stairs
6J	1/1	645	n/a	741/1054	1.3730123	SE	corridor, elevator, stairs

GPW 29

2nd Ave Holding 1 LLC v Lowenbraun
2020 NY Slip Op 30803(U)
March 16, 2020
Supreme Court, New York County
Docket Number: 162426/2019
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

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2ND AVE HOLDING 1 LLC,

Plaintiff,

- v -

NORMAN LOWENBRAUN, RENATA LOWENBRAUN, WENDY LEWIT, LESLIE LEWIT MILNER,

Defendants.

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INDEX NO. 162426/2019

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 4-30 were read on this motion for miscellaneous.

By order to show cause, defendants seek an order finding that real property known as 1306 Second Avenue, New York, NY is heirs property within the meaning of Real Property Actions and Proceedings Law (RPAPL), issuing a notice to all parties identifying that plaintiff, as alleged 16.667 percent owner of the property, has sought its partition by sale of defendants' right to purchase all of plaintiff's interest, and of the time and place of the statutorily-mandated settlement conference, its purpose, and the requirements of RPAPL § 993. Plaintiff opposes.

I. PROCEDURAL BACKGROUND

On December 24, 2019, plaintiff commenced this action against defendants for partition of the above-referenced property, having acquired from Guy Lewit, the brother of two of the defendants, in exchange for $1.2 million, a 16.667 percent interest in the property. Defendants Lewit and Lewit Milner (Milner) each have a 16.667 interest in the property. The remaining 50 percent interest is held by defendant trust. Plaintiff alleges in its complaint that defendants "are

using the premises for their own purposes without collecting or paying rent and/or without accounting to [him] for the income of said property." (NYSCEF 1). Plaintiff simultaneously filed a notice of pendency against the property. (NYSCEF 2).

II. DEFENDANTS' CONTENTIONS (NYSCEF 4-20)

By deed dated October 2, 1973, title to the property was equally conveyed to Robert Lewit and Nathan Lowenbraun, individually. By deed dated December 3, 2009, Nathan Lowenbraun conveyed an undivided 38.1 percent interest of his 50 percent interest in the property to the 2009 Lowenbraun trust. By executor's deed dated May 31, 2013, Guy Lewit, conveyed an undivided 16.667 percent interest in the property to each Lewit sibling, defendants Lewit and Milner, and to himself. By deed dated September 14, 2017, Nathan Lowenbraun and the 2009 trust together conveyed their interest in the undivided 50 percent interest to defendant trust. According to defendants, by virtue of these conveyances, they co-own the property as tenants in common. (NYSCEF 5, 6, 13-16).

By affidavit, defendant Milner states that she and the other defendants have collected rents from tenants at the property and rely on that income. She alleges that plaintiff's principal, a developer and "claimed owner" of an adjacent property, "brought this partition action to force an involuntary sale of the Property . . ." which she characterizes as predatory. She recounts an unsolicited email dated June 28, 2018 by which plaintiff's principal introduced himself as a "new neighbor" and developer of an adjacent property and asserts that he claimed in the email that the property in issue was worthless and could not be developed unless combined with an adjacent property. Thus, he maintained, the sole option available was to sell to him all interests in the property. Milner received many such emails from him. (NYSCEF 5).

Milner also describes how on October 17, 2018, plaintiff's principal personally appeared

at her private residence and told her that he had purchased two buildings adjacent to the property which would be rendered valueless once his planned development is completed as it would dwarf the property. She also alleges that her brother had given defendants no notice of the sale of his interest in the property to plaintiff.

Defendants argue that RPAPL § 993 governs the circumstances in issue here as the property constitutes "heirs property" as it is held: "(i) by tenants in common with no agreement binding all co-tenants in the event of partition; (ii) by at least one co-tenant who acquired title from a relative; and (iii) 20% or more of the interests are held by co-tenants who are relatives." They observe that each of the pertinent deeds is silent as to the form of the tenancy conveyed, resulting in the presumption that title was taken as tenants in common with undivided interests.

As the property is heirs property, defendants ask that the various requirements set forth in RPAPL § 993 become operative by entry of the appropriate orders.

III. PLAINTIFF'S CONTENTIONS (NYSCEF 26-30)

By affidavit, plaintiff's principal alleges that defendants will receive a higher price for the property from him than from "a third party purchaser seeking to own and operate the premises 'as is,'" and that he paid a "substantial premium" for his share as compared to what Guy would have received from a third party. As his purchase of Guy's interest in the property was part of good faith attempts to acquire the others' interests, he accuses defendants of seeking to punish plaintiff for those efforts.

Plaintiff's principal also contends that defendants refused to allow him to manage the property jointly or to communicate with him, and that they have precluded him from participating in negotiations with the management company, new tenants, and brokers. He complains that plaintiff has thus received only $20,000 for its one-sixth interest in the property,

and represents that he has offered $9 million for the remaining five-sixths' interests, along with other offers he has made which, he asserts, are lucrative to defendants, such as structuring a "deal" that would "satisfy [them]" and offer to swap properties with them with the net effect of doubling their income and equity. He has also assertedly offered to exchange plaintiff's interest in the property solely for the air rights. Thus, plaintiff's conduct with respect to defendants is not predatory and is not the kind of conduct targeted by RPAPL § 993.

Given the "stalemate" between the parties, plaintiff seeks partition. Plaintiff's principal states that he does not intend to provide defendants with "anything less than fair market value . . ." Moreover, due to defendants' "delay in bringing suit in order to exhaust all other potential avenues for resolution," plaintiff is "confronted with an entirely new statutory scheme designed to curb abuses not present in the instant action," resulting in a possible significant financial loss.

In the alternative, plaintiff asks that the price it paid for its share of the property and the price it has consistently offered to defendants be considered at any settlement conference held under the statute or in connection with the determination of the property's value pursuant to the statute.

IV. ORAL ARGUMENT

At oral argument, defendants requested an additional order providing that "there can be no such lien placed on a property during the pendency of this action." (NYSCEF 31).

V. DISCUSSION

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 993(3)(b):

> In any action to partition real property, the court shall determine, after notice and the right to be heard afforded to each party, whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record.

"Heirs property" means real property held in tenancy in common which satisfies all of the

> following requirements as of the filing of a partition action:
> (i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;
> (ii) any of the co-tenants acquired title from a relative, whether living or deceased; and
> (iii) any of the following applies:
> (A) twenty percent or more of the interests are held by co-tenants who are relatives;
> (B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;
> (C) twenty percent or more of the co-tenants are relatives of each other; or
> (D) any co-tenant who acquired title from a relative resides in the property.

(RPAPL § 993[2][e]).

The legislative history of the statute reflects the following justification for it:

> As a general rule under New York law, where multiple owners hold real property as tenants in common, any one co-owner can try to force the sale of the property by filing a partition action in court under RPAPL article nine. In the supporting memoranda, the Legislature observed that
>
> [i]n recent years, predatory real estate speculators have taken advantage of New York's laws governing partition actions by purchasing a stake in a residential property - usually after a number of family members have inherited the property - and then using that ownership stake to file a partition action to dispossess the family of the property through a forced sale, often for pennies on the dollar relative to the actual value of the property. Lower- and middle-class families are particularly susceptible to these types of schemes, as they often do not engage in the kind of sophisticated estate planning that could prevent predatory partitioning actions.
>
> This legislation would address the issue of predatory partition actions, while preserving a co-owner's right to sell his or her share of the property. The Act would only apply in situations where at least one of the co-owners has inherited their property interest from a relative and there is no written agreement otherwise governing partition among the owners.

Notwithstanding the legislative intent, and while plaintiff allegedly offered defendants, members of "a family of significant means," well above fair market value for the mixed-use property where not one of them lives, defendants indisputably satisfy each and every statutory requirement for finding that the property is heirs property. Thus, there is an insufficient basis for determining otherwise. Absent a formal written motion, defendants' request concerning a lien cannot be considered.

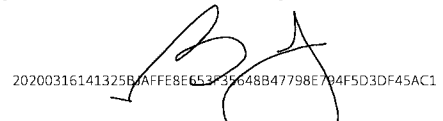
The statute requires that once it is determined that the property is heirs property, the property must be partitioned "in accordance with this section unless all of the co-tenants agree in a record." RPAPL § 993(3)(b). As it is not disputed that all co-tenants do not agree in a record and as plaintiff has commenced a partition action, pursuant to subdivision 5(a), the court must hold a conference within 60 days after the date of the filing of a request for judicial intervention, or on a date agreed to by the parties. Here, the RJI was e-filed on January 31, 2020, and March 31, 2020 is the 60th day.

In light of the worldwide COVID-19 (coronavirus) crisis and the updated operational protocols for the trial courts that take effect as of today at 5 pm and include the "postponing [of] all nonessential" court functions (*see* Memorandum of Lawrence K. Marks, dated March 15, 2020), the scheduling of the settlement conference mandated by RPAPL § 993(5)(a), is postponed until further notice, as are all other statutorily mandated proceedings.

Accordingly, it is hereby

ORDERED, that defendants' motion for an order finding that the property is heirs property is granted; and it is further

ORDERED, that proceedings required by the statute are stayed pending the formal resumption of nonessential court functions, when directed by the Unified Court System.



3/16/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

2nd Ave Holding 1 LLC v Lowenbraun
2021 NY Slip Op 31276(U)
April 16, 2021
Supreme Court, New York County
Docket Number: 162426/2019
Judge: Barbara Jaffe
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12

----------X

2ND AVE HOLDING 1 LLC,

Plaintiff,

- v -

NORMAN LOWENBRAUN and RENATA LOWENBRAUN, Trustees of the Nathan Lowenbraun Irrevocable Trust, WENDY S. LEWIT and LESLIE LEWIT MILNER,

Defendants.

----------X

INDEX NO. 162426/2019

MOTION DATE _____

MOTION SEQ. NO. 001

SUPPLEMENTAL DECISION & ORDER ON MOTION

HON. BARBARA JAFFE:

This is an action for partition of real property located at 1306 Second Avenue in Manhattan. Defendants' motion for an order determining that the property constitutes "heirs property" within the meaning of the newly enacted Real Property Actions and Proceedings Law (RPAPL) § 993 was granted (NYSCEF 32), ultimately giving rise to a hearing as to the fair market value of the property.

I. FACTUAL BACKGROUND

On August 21, 2018, plaintiff purchased a four-story mixed-use property located at 1308 Second Avenue in Manhattan. On April 29, 2019, plaintiff purchased from Guy Lewit a 16.667 percent (one-sixth) interest in the 1306 Second Avenue (1306), the neighboring four-story mixed-use property immediately south of 1308 and on the east side of Second Avenue. Both properties are between East 68th and 69th Streets. Defendant trust owns a 50 percent interest in 1306, and the other two defendants each own a 16.667 percent interest.

The gross building area of 1306 is 7,892 square feet above grade, comprising 12

residential units, one of which is rent-stabilized, with four units on each of the second, third, and fourth floors. There are also two ground-floor commercial units, one of which has been vacant for several years. The fourth-floor units are duplexes with shared patios. (NYSCEF 1).

II. PROCEDURAL BACKGROUND

Based on its one-sixth interest in 1306, plaintiff commenced this partition action on December 24, 2019. (*Id.*). In their answer, filed on January 31, 2020, defendants assert as an affirmative defense that plaintiff is barred by RPAPL § 993 from the relief it seeks. (NYSCEF 3). On February 5, 2020, plaintiff was ordered to show cause why 1306 should not be deemed heirs property within the meaning of RPAPL § 993. (NYSCEF 19). Upon consideration of the parties' papers and after oral argument, by decision and order dated March 16, 2020, defendants' motion was granted and the property was held to be heirs property (NYSCEF 32), thereby triggering the remaining provisions of the statute.

Due to the recent onset of the COVID-19 pandemic (pandemic), further proceedings pursuant to the statute were stayed until May 4, 2020. A settlement conference mandated by RPAPL § 993(5)(a) was scheduled (NYSCEF 39), adjourned, and held without a settlement being reached. Thus, pursuant to RPAPL § 993(6)(d), a duly licensed and disinterested real estate appraiser (neutral) was appointed to determine the fair market value of 1306. As the neutral had selected September 24, 2020 to perform her inspection of 1306, and as she indicated her intent to appraise 1306 as of that date, it was also ordered that September 24, 2020 was the date as of which she would appraise it. (NYSCEF 50).

On November 20, 2020, the neutral efiled her verified appraisal (NYSCEF 55), and by order dated December 2, 2020, pursuant to RPAPL 993(6)(e), the parties were notified that the fair market value of the property, appraised as of September 24, 2020 by David M. Shlosh and

Marianne T. Mueller of Mueller Lang & Associates, LLC, was $4 million. (NYSCEF 58).

By affirmation dated January 14, 2021, plaintiff objected to the neutral appraisal for various reasons and submitted an independent appraisal. (NYSCEF 59). By letter of the same date, defendants expressed their objections to the neutral's appraisal and reserved their rights to offer, pursuant to RPAPL § 993(6)(f), evidence at a statutory hearing to be held to determine the fair market value of the property. (NYSCEF 64). The parties' arguments are addressed along with the issues raised at the hearing, *infra,* III.A.

At a pre-hearing conference held on February 9, 2021, defendants were given, over plaintiff's objection, until February 17, 2021 to submit their independent appraisal, which they timely submitted. (NYSCEF 66).

By stipulation so ordered on March 5, 2021, the parties agreed, in pertinent part, that each written appraisal would serve as the respective appraiser's direct hearing testimony in lieu of direct examination, and that each party would be permitted to cross-examine, re-direct, and conduct such other examination as permitted by me. (NYSCEF 68).

III. HEARING

The hearing was held via Microsoft Teams on March 10, 11, and 12, 2021. Each party consented to the application of the Part 12 Virtual Protocols.

A. *In limine* applications

1. Plaintiff (NYSCEF 59-63)

a. Objection to neutral appraisal

In its January 14 letter, plaintiff complained that as the neutral appraisal was prepared by Shlosh and not by Mueller, the appointed appraiser, it was precluded from conducting a pre-hearing inquiry into Shlosh's qualifications and biases.

At the hearing, Shlosh testified that he has never spoken with, nor performed any appraisal services for, any of the defendants, and that Mueller was his supervisor who had assigned him to prepare the appraisal, which she reviewed and certified. Additionally, Shlosh's qualifications, as set forth in the appraisal and in his testimony, including that elicited by plaintiff, reflect that he is well-qualified to testify as an expert appraiser in this matter. Consequently, any prejudice arising from plaintiff's inability to conduct its own pre-hearing inquiry into Shlosh's background was dispelled at the hearing. Moreover, as the neutral appraisal had been efiled on November 20, 2020, plaintiff had 24 days before it interposed its written objection within which to research Shlosh's qualifications and biases. And, as the hearing was held two months after that, nothing prevented plaintiff from conducting a broad investigation prior thereto.

b. As-of date of valuation

Plaintiff also asserted in its January 14 letter that as it had filed the partition action on December 24, 2019, before the onset of the pandemic, the property should have been appraised when the New York real estate market was "bustling." Having unknowingly assumed the risk of the market downturn resulting from the pandemic, plaintiff maintains that "[t]he most equitable and logical date as of which the valuation should have been conducted is December 23, 2019, the day before the complaint was filed."

In support, plaintiff relies on Business Corporation Law (BCL) § 1118, which governs the valuation of shares to be purchased from one bringing a proceeding for judicial dissolution of a corporation. Pursuant to subsection (b), absent an agreement on the fair value of such shares, the court may determine the fair value "as of the day prior to the date on which the petition for dissolution was filed . . ." Plaintiff contends that such a date for valuation will ensure that

defendants do not profit from the pandemic by "consolidating their interests in the premises for pennies on the dollar." Plaintiff, having purchased its one-sixth interest in 1306 in April 2018, pre-pandemic, paid far greater than it will receive if 1306 is valued as of a post-pandemic date, a punitive result that goes far beyond the legislative intent of "protect[ing] low and middle income families from being forced into selling family property at a loss."

Absent sales of comparable properties during the pandemic, plaintiff argues, a valuation date of December 23, 2019 would yield a baseline valuation of the premises that is "both more equitable and grounded in an objective reality" and would provide a "more useful figure" from which to determine the fair market value. Alternatively, plaintiff asks that to arrive at a fair market value, the date as of which 1306 should be appraised must either precede the date on which the action was filed or follow the abatement of the market disruptions due to the pandemic. It predicts that "[w]ith the rollout of COVID-19 vaccines in its infancy, there exists just cause to believe that the market will begin to stabilize and comparable sales will begin to go forward."

This objection is addressed *infra*, at IV.B.

c. Timeliness of submission of defendants' independent appraisal

At the start of the hearing, plaintiff's counsel moved to preclude the admission in evidence of defendants' independent appraisal, claiming that defendants had been given a 30-day opportunity to tailor their appraisal in rebuttal of plaintiff's appraisal, which had been efiled 30 days earlier. Defense counsel denied that defendants' appraisal constituted a rebuttal and observed that nothing in the statute supports plaintiff's objection.

In RPAPL § 993(6)(f), the provision mandating that a hearing be held to determine the fair market value of the property, there is no requirement that evidence offered by parties as to

the fair market value be submitted at any particular time. Thus, a court is given broad discretion in that regard, constrained solely by fairness and due process.

Plaintiff identified nothing in defendants' appraisal indicating that it had been prepared in rebuttal of plaintiff's appraisal, and thus, plaintiff demonstrates no basis for its objection. Moreover, absent any schedule or agreement of the parties relating to the offer of evidence in this aggressively litigated matter, and as defendants had clearly indicated in their January 14 letter that they were reserving their right to offer evidence at the hearing, and counsel did not cross examine defendants' appraiser on this issue, plaintiff waived its objection to defendants' submission of their independent appraisal.

d. Exhibits offered by defendants (DX-DEMO-1, 2, 3)

Plaintiff's counsel also objected to three exhibits offered by defendants the morning of the hearing, asking that they be precluded from offering a copy of the tax bill as of June 2020 for 1306 and a list of rent-stabilized apartments. Absent any dispute that the building contains a rent-stabilized tenant, the objection was overruled, and even though the amount of taxes owed as of June 2020 is undisputed, I sustained the objection to the tax bill. As counsel agreed that the third exhibit, a spread sheet setting forth the salient information gleaned from the three appraisals, was demonstrative, he withdrew his objection to it and raised no issue as to the data contained therein.

2. Defendants (NYSCEF 64)

In their January 14 letter, defendants objected to the neutral's appraisal on the grounds that it does not reflect that the building is rent-stabilized and that the comparable properties considered had sold "at substantial premiums above market value as part of an assemblage of properties acquired for redevelopment . . ." These facts, according to defendants, "require a

downward adjustment of the fair market value" of the property as of the valuation date from $4,000,000 to approximately $3,000,000 or less.

Defendants' objection is addressed, *infra*, at IV.D.

B. Testimony

As this hearing may be the first held pursuant to RPAPL § 993, which became effective December 6, 2019, and as the Legislature provided no guidance as to its procedural mechanisms, the parties' lawyers entered into a stipulation addressing many procedural aspects.

1. Testimony of neutral appraiser

David Shlosh is a certified appraiser with approximately 25 years of experience and memberships in various professional organizations and has performed many appraisals of air rights as well. He testified that he and Mueller inspected the building's south retail unit, apartment units 3RS and 4RN, the common areas, rear yard, and basement. He was not sure how long the retail unit has been vacant.

a. Comparable sales

In appraising the property as of September 24, 2020, Shlosh first considered comparable sales, which he assumed include the air rights, or excess development rights (EDR), for each property. Those figures, as set forth in a chart in Shlosh's appraisal (NYSCEF 54, at 40), are derived from the sales of:

1388 Second Avenue on February 26, 2020 for $5.975 million;
1364 York Avenue on January 31, 2020 for $6.050 million;
1341 Second Avenue on December 10, 2019 for $7.2 million; and
1308 Second Avenue on August 21, 2019 for $7 million

The square footage of each of these properties is, respectively 6,000, 9,180, 7,475, and 7,052, which are similar enough to 1306 and thus there was no need to adjust any of them. Nor did Shlosh see a need to adjust for the age or condition of the properties.

The 13,488 square feet of EDR attributed to 1306, Shlosh acknowledged, does not expire and it possesses intrinsic value, although he did not appraise the EDR separately. The square footage of the EDR for each of the four properties, is respectively, 12,750, 15,320, 10,465, and 14,328. While each of the four buildings and 1306 are assigned the same maximum floor to area ratio (FAR) of 10, Shlosh opined that the ability to build to the maximum FAR depends on zoning and other considerations.

The prices per square foot of these properties are, respectively, $996, $659, $963, and $993, however, given the "inferior" quality of the York Avenue property, Shlosh had adjusted it by 10 percent, yielding $725 per square foot.

Shlosh applied an overall adjustment of 25 percent representing the negative market impact of the pandemic which, according to him, rendered the demand for residential units below historic norms on the upper east side of Manhattan. He based this "conservative" figure on "dozens of conversations" he had with appraisers, investigators, and brokers, who were discussing the pandemic's impact "ad nauseum," on information he gleaned at Appraisal Institute events, and on an item from *The PwC Real Estate Investor Survey for the Third Quarter of 2020*, entitled, "Unknowns Dampen CRE Sales Activity," which focuses on the pandemic's impact negative impact, along with that of the preceding growth of e-commerce (*id*., at 29). Shlosh had learned that valuations for buildings like 1306 are "being hit" by 15 to 50 percent due to the pandemic. He also observed that businesses and individuals had fled Manhattan in September 2020 and that the lack of data to support the reduction is due to the lack of sales. Shlosh thus represented that he had considered all pertinent facts and circumstances, and did not average out the figures reported by his sources.

Shlosh observed that banks "have different motivations for reporting different things,"

and thus was not persuaded to alter his position based on the alleged 5 to 10 percent reduction of values taken by banks in response to the pandemic. He also denied that banks are necessarily more conservative than other investors. He conceded, however, that while the market downturn impacted walk-up buildings on the upper east side of Manhattan, they were not as negatively impacted as luxury buildings.

According to Shlosh, the presence of the rent-stabilized unit in the building had no major impact on the value of 1306 as the rents for all of its residential units are consistent with those in the neighborhood, and he accounted for a nine-month exposure time for 1306, which would commence in January 2020, before the onset of the pandemic. The indication he had seen in ACRIS (New York City's Automated City Register Information System) that 1306 had been sold on April 29, 2019 for $1.2 million in an arm's length transaction struck him as highly unlikely, and when counsel informed him that it represented an interest in the building of 16.667 percent, he was not surprised. Nonetheless, he denied that the value of the entire building as of the date of valuation would be properly based solely on the sale price of the 16.667 percent interest.

Shlosh's adjustments yield prices per square foot of the four buildings at, respectively, $747, $544, $722, and $744. After averaging the adjusted prices, he arrived at $689. However, as the values range from $544 to $747 per square foot, and in light of the market at the time, Shlosh selected the midpoint of $650, and denied that it constitutes a further reduction in value. Rather, he testified, $650 per square foot accounts for the value of the air rights which is implied in the sales comparison value. He then multiplied $650 by 7,892, the square footage of 1306, yielding a rounded $5.13 million.

b. Income capitalization

As 1306 produces rental income, Shlosh gave primary consideration to the income

capitalization method of valuing property. He described capitalization rates as reflecting the rates investors would pay for a property at a point in time regardless of its income, and contended that such rates are essential to valuing a property.

Based on the rent roll for 1306, reimbursement income such as for a tax refund, and market rent estimates, Shlosh estimated that the potential gross annual income (PGI) is $469,830, representing "the total income attributable to the property at full occupancy before deduction for vacancy and operating expenses." (*Id.*, at 53). Given market conditions and notwithstanding historic rates of 5 to 10 percent, he applied to the PGI a vacancy and collections reduction of 12.5 percent over time, representing losses in rent incurred for vacant units, noncollection of rents, and fixing up of vacated units, yielding an effective gross income (EGI) of $411,101 per year, the anticipated income from all operations of the real property. (*Id.*, at 53).

Shlosh considered the fixed and variable expenses "that would typically occur at periodic rates during the projection period." (*Id.*). They were $23,676 for utilities, 7,892 for insurance, 23,676 for payroll, $28,777 for management, and $149,833 for taxes, totaling $233,853.

Absent information about the income and expenses of the comparable buildings, Shlosh considered national and local surveys, anecdotal information from local brokers, the impact of the pandemic, income from other retail and residential properties as of September 2020, and a table of capitalization rates produced by local brokers (NYSCEF 54, at 56), although the table is entitled "National Apartment Market," arriving at a capitalization rate of 6 percent for 1306. He then subtracted the operating expenses of 1306 from the EGI, yielding $177,248, which he divided by the capitalization rate of 6 percent, arriving at a rounded value of $2.95 million for 1306.

c. Highest and best use

Shlosh testified that to appraise real property, its highest and best use must be determined according to the "reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." (NYSCEF 54, at 22). "[I]f vacant and available for development," Shlosh found that the highest and best use of 1306 as of September 24, 2020, "is for current development to the maximum density permitted under existing zoning regulations." (*Id.*, at 23).

As improved, consideration must be given to whether the property should remain unchanged or be demolished or modified. Although Shlosh acknowledged that there are no easements recorded against the property nor any legal restrictions placed on its development, the building is in a "densely populated residential commercial corridor" where, at the time of the hearing, the rental of residential units yielded "an economic return." And although the development of the property would increase its income, its present rental income demonstrates that its highest and best use is its present mixed use as construction had halted due to the pandemic and given the existing tenancies and vacancies. (*Id.*, at 24).

d. Conclusion

Shlosh reconciled his two valuations, $5.13 million and $2.95 million, at $4 million, with a "bias" toward the income approach.

2. Testimony of defendants' appraiser

Richard Evans, a certified appraiser for 30 years, is licensed in New York, New Jersey, and Connecticut, with experience in appraising air rights both with and without a fee interest. The sales data on which he relied was derived from sources such as CompStak, Costar, and Genesis, whereas the rental data he considered may have come from appraisals previously

performed by his associates.

Like Shlosh, Evans appraised 1306 as of September 24, 2020, and allotted to it an estimated exposure time of 12 months, which includes a period preceding the onset of the pandemic.

Notwithstanding the pandemic, Evans testified that the demand for residential units in and around 1306 is "good," and that development of its EDR would create additional units to rent out or sell. He cited a finding by the Federal Reserve Bank that a recovery from the pandemic would be more pronounced and dramatic than that following the 2008 recession, absent a banking crisis. In his appraisal, Evans stated that the economy had "bottomed-out" in April 2020 and rebounded beyond expectations, and he agreed that with the availability of COVID-19 vaccinations, the economic outlook was even better than in April 2020. Nonetheless, Evans declined to link such progress with the development potential of 1306, identifying factors such as people working remotely instead of commuting to Manhattan, which he directly linked to the pandemic. Thus, he referenced higher vacancy rates, lower rents "across the board," and weaknesses in the rental market, and reported national and regional improvements, except for Manhattan.

a. Comparable sales

Evans's analysis of comparable sales is derived from the sales of:

1388 Second Avenue on February 26, 2020 for $5.975 million;
1670 Third Avenue on December 25, 2019 for $7,097,382;
1711 Second Avenue on November 1, 2019 for $6.15 million;
1368 York Avenue on January 31, 2020 for $7.8 million;
1341 Second Avenue on December 10, 2019 for $7.2 million; and
240 East 75th Street on March 27, 2019 for $6.9 million

(NYSCEF 66, at 60). He gleaned this data from local reported tax appeals, broker's advertisements, Costar, and listings, to name a few of Evans's sources.

Evans adjusted the sale price of the 240 East 75th Street property by 5 percent given the change in the rent-stabilization law effective in June 2019 which would not have been factored into the earlier sale of that property. He also adjusted the sale price of 1368 York Avenue by adding to it 5 percent given its location, and subtracted 5 percent from the sale price of 240 East 75th Street due to its location.

The entire square footage of each these properties is, respectively 6,000, 8,216, 7,300, 11,191, 7,475, and 7,912. No adjustments were made.

The square footage of the EDR for each of the six properties, is respectively, 12,150, 17,114, 11,450, 14,339, 10,465, and 2,265. Evans adjusted the 240 East 75th Street property by 5 percent given its relatively small EDR. He looked for but did not find any sales of the air rights for these properties apart from the sales of the buildings themselves.

The price per square foot of each of these properties is, respectively, $996, $864, $842, $697, $963, and $868.

Like Shlosh, Evans consulted with other market professionals and, based on reductions of 10 to 15 percent reported to him on account of the pandemic, he reduced the figures for each property by 10 percent, relying in large part on the Federal Reserve of New York's Beige Book which provides in its comprehensive "Summary of Economic Activity" for New York City in November 2020 an analysis of the contrasting impacts of the pandemic and the 2008 recession (*id.*, at 25-37). While he perceived no legal impediments to developing the EDR of 1306, he opined that it is not feasible due to the pandemic and that otherwise, he could not offer an opinion about whether 1306 is structurally sound enough to support development.

According to Evans, his adjusted data reveals a range of from $368,550 to $720,000 per unit, with a mean of $499,235 per unit, and from $658.65 to $896.25 per square foot, with a

mean of $782.52 per square foot. (*Id.*, at 67). "Placing the most emphasis" on the Second Avenue sales, Evans estimated the per unit value of 1306 to be $575,000, and the value per square foot to $840, yielding, respectively, $8.05 million for the 14 units, and $6.629 million for the 7,892 square feet. (*Id.*, at 68).

Evans also calculated the value of 1306 based on the EGIM (effective gross income multiplier), the last of which he credibly described as an "extra step" he employs when appraising apartment buildings. He calculated the EGIM by subtracting the vacancy and collection losses from the potential gross income, which he derived from the New York Real Property Income and Expense (RPIE) statements or from CoStar or broker advertisements. He distinguished the calculations for determining the EGIM from those used for arriving at the income capitalization rates as being significantly simpler, and verified them against the RPIE, finding that for 1388 Second Avenue, the EGIM is 21.04, for 1670 Third Avenue, it is 13.70, for 1368 York Avenue, it is 12.84, for 1341 Second Avenue it is 20.92, and for 240 East 75th Street it is 13.99. Pertinent data was not available for 1711 Second Avenue.

Evans rejected the notion that a valuation should be arrived at by taking the average of the three calculations, as "appraisers don't average." Rather, he advocated that each approach be evaluated in order to attribute the greatest weight to the most valid, and opined that the EGIM is the strongest indicator of value of the three as the building's income is directly impacted by the pandemic, whereas the price per unit and per square foot are not. He acknowledged that calculating based on the EGIM produced a value of almost half of that based on the price per unit or square foot, and that he had rejected an EGIM from within the 12.84 to 21.84 range of the comparable sales in favor of the opinions of four active local brokers that the range is closer to 8 to 15.

Given the pandemic, the long-term vacancy of the residential unit, and the vacancy of the retail unit, Evans chose an EGIM of 10 for 1306, and arrived at a value of $4.45 million which he rounded to $5 million to account for the higher values reached for 1388 Second Avenue. (*Id.*).

b. Income capitalization

Evans again relied on management's projected income and expenses (*id.*, at 85), arriving at a gross income of $445,027.

Based on the historical operating expense statements obtained from management, and historical expenses from similar properties, Evans calculated the variable annual expenses for 1306 as follows: The projected annual payroll expense is $24,000 based on the salary of a single visiting superintendent. For heat and hot water furnished to three of the residential units, Evans estimated the annual cost at $13,000. For building maintenance, Evans estimated an annual $6,000, and assigned 4 percent of the EGI to management and professional fees which he states is typical for such properties and size of the collectable income, or $2,500 per year. The expense of reserves for replacements was estimated by Evans to be $150 per unit, although management seldom includes such reserves in expense statements.

Based on historical figures, Evans calculated the fixed annual expenses of 1306 as follows: The insurance expense is $15,000, much like that for buildings of the type, location, and vintage of 1306. Water and sewer expenses are $9,800, and the actual taxes are $149,833. The total estimated expenses for 1306 is $241,734, or 54 percent of the EGI which is within the operating range for properties like 1306, although he subtracted $40,000 from the final value to account for the six-month rent loss from the vacant retail unit and for brokerage fees of $24,000.

Evans included in his chart the capitalization rates reported for each comparable sale but did not use them in his calculations as they are all pre-pandemic. Instead, Evans culled

post-pandemic capitalization rates from property sales in other parts of Manhattan which, he asserted, are similar to the rental structures, vacancy rates, and EDR of 1306 and on the upper east side:

> 439 Amsterdam Avenue, sold for $17 million in September 2020, 12 units, 5 percent cap rate;
> 94 St. Marks Place, sold for $8.5 million in August 2020, 8 units, 5.5 percent cap rate;
> 506 East 6th Street, sold for $4 million in August 2020, 14 units, 5.2 percent cap rate;
> 124 W. 78th Street, sold for $4.5 million in August 2020, 10 units, 4.25 percent cap rate;
> 1024 Second Avenue, sold for $7.1 million in March 2020, 7 units, 4.20 percent cap rate;
> 345 East 65th Street, sold for $8.28 million in July 2019, 20 units, 4.41 percent cap rate;
> 12 West 104th Street, sold for $8.1 million, in June 2019, 16 units, 4.41 percent cap rate;
> 310 West 89th Street, sold for $5.6million in October 2019, 10 units, 4 percent cap rate;
> 439 West 46th Street, sold for $6.6 million in April 2019, 20 units, 4 percent cap rate;
> and 345 East 65th Street, sold for $8.280 million in July 2019, 20 units, 4.41 percent cap rate

(*Id.*, at 82).

Evans adhered to rates of 4 percent and lower for the pre-pandemic sales, and 5 percent and more for the post-pandemic sales. While he acknowledged that there were sales that had closed between April 2019 and September 2020, whereas the comparable sales had closed between March 2019 and February 2020, Evans did not include in his calculations the capitalization rates of sales with capitalization rates of three percent or less even though most of them had closed between April 2019 and September 2020. And, although the local vacancy rate as reported in CoStar is 5.4 percent, Evans applied a capitalization rate of 5 percent for the residential units and 10 percent for the commercial units, which he blended, explaining that both the pre- and post-pandemic sales reflected a trend of increasing rates.

In calculating the value, again finding that the gross income of 1306 is $445,027, with annual expenses of $241,734, which yielded a net operating income of $203,293, which he divided by the capitalization rate of 5 percent to yield $4,065,860. Evans adjusted that figure by the vacancy and collection losses and brokerage fee to yield $4 million.

c. Highest and best use

If vacant, Evans opined in his appraisal that the highest and best use of 1306, would be "for it to be held pending the end of the COVID pandemic and the economic fallout, and then developed with a residential building" (*id*., at 54), whereas as improved, Evans determined that the condition of 1306 comports with market expectations and therefore requires no further improvement, given the sufficient income it provides. Thus, considering a variety of pertinent factors, and as the area demand is "good and likely to remain that way for the foreseeable future," Evans's opinion is that the existing improvement as a mixed-use, residential apartment property is the highest and best use of the land. While he acknowledges that 1306 and each of the comparable buildings is assigned the same maximum FAR of 10, Evans was unable to say whether 1306 could physically support a full development of the air rights without reinforcement and he recognized the obstacles posed by the existing tenancies, which depend on whether the building is demolished and whether tenants accept buyouts.

d. Conclusion

Evans favors the income capitalization approach for valuing the property given the likelihood of its appeal to investors and its reliance on internally generated data, whereas the sale comparison approach is tied to pre-COVID data. Based thereon, Evans found that the fair market value of the building as of September 2020 is $4 million.

3. Testimony of plaintiff's appraiser

Joseph Lifschitz, a fee appraiser and consultant with Westrock Appraisal Services for approximately eight years, has been licensed solely as a New York State assistant appraiser for five years, with plans to become fully licensed upon passing the certified general appraiser

examination in April 2021. He has never been qualified as an expert witness, has written no articles about the appraisal process, has never been a speaker at any seminars about appraising, and has won no awards. He performs some 20 to 25 appraisals a month, approximately one-third of which are for mixed use properties and one-quarter of which are in New York City.

Plaintiff paid Lifschitz an hourly fee of $350 and Westrock $10,000 for the two appraisals Lischitz performed, one as of December 29, 2020 and the other as of December 23, 2019. Those dates were selected by plaintiff's principal, with whom Lifschitz had spoken with several times.

Given his status as an assistant appraiser, Westrock's principal reviewed and signed the appraisals prepared by Lifschitz who visited the property. In preparing his appraisals of the building alone, Lifschitz adhered to the Unified Standards of Professional Appraisal Practices, Title XI of the Financial Institutions Reform Recovery and Enforcement Art of 1989, and the Appraisal Institutes Code of Professional Ethics and Standards. To his knowledge, there are no standards or guidelines for valuing a building's air rights.

While acknowledging that market value is "the most probable price which a property would bring in a competitive and open market under all conditions requisite to a fair sale" if the price is not affected by the "undue stimulus" which Lifschitz attributes to the June 2019 amendment to the rent-stabilization laws, Lifschitz minimized the impact of the amendment on 1306, and observed that the presence of only one rent-stabilized tenant with a lease at not much below market price would not likely deter a buyer.

a. Comparable sales (NYSCEF 62)

Lifschitz's analysis of comparable sales is derived from the sales of:

135 East 63rd Street on December 1, 2020 for $6,493,542;
1129 Lexington Avenue on April 17, 2019 for $6,009,632; and

1341 Second Avenue on December 10, 2019 for $6,124,690.

These figures are not the actual sale prices. Rather, Lifschitz adjusted each at the outset to account for the differences in EDR among them, even though the actual sale prices presumably reflect EDR values.

The differences between the 13,488 square feet of EDR for 1306 and the square footage of the EDR of each of the comparables are, respectively, 7,987, 7,352, and 10,465. Using a baseline of 9,000 square feet in an effort to render the three properties comparable to the EDR of 1306, he multiplied the difference in square footage between the baseline and the EDR by the price per square foot of $734 and added it to his adjusted sale prices. As one of the property's EDR exceeds 9,000 square feet, he multiplied the difference between them by $734 and subtracted the product from the adjusted sale price.

Lifschitz derived the figure of $734 from the valuations of four parcels of vacant land on the upper east side (NYSCEF 62, at 62, 90), reasoning that the sale of vacant land, like the sale of air rights, entails the sale of the right to build. He conceded, however, that he did not check to see whether $734 per square foot is consistent with the square footage of other buildings on the upper east side within the past three years.

For 135 East 63rd Street, Lifschitz multiplied the difference between the baseline square footage of 9,000 and the actual EDR square footage of 7,987 by $734, yielding $743,542, which he added to its actual sale price of $5.75 million, yielding $6.5 million. For 1129 Lexington Avenue, he multiplied the difference between 9,000 and 7,352 square feet of its actual EDR by $734, yielding $1,209,632 which he added to the actual sale price of $4.8 million, yielding $7.22 million. And, as the EDR of 1341 Second Avenue is greater than 9,000 square feet, he deducted from its actual sale price of $7.2 million the product of $734 and the difference between 9,000

and 10,465 square feet, or $1,075,310, yielding $8.275 million.

Lifschitz then adjusted each property by an additional 5 percent, as the average actual sale prices of the three properties is $5.917 million, yielding $6.2 million.

Lifschutz performed additional adjustments. Due to the respective locations of 135 East 63rd Street and 1129 Lexington Avenue, he added 10 percent to the value of the first, and deducted 15 percent from the value of the second, and further deducted by 5 percent the value of the second due to its smaller size. He then reduced, on account of the ages of the properties, 5 percent, and for their condition, 10 percent, and for their quality, 5 percent.

Owing to the pandemic, Lifschitz deducted 10 percent "off the top" of the value of each property based on bank adjustments for the pandemic ranging from 5 to 10 percent. According to Lifschitz, higher pandemic adjustments are accorded office buildings which he feels have more difficult recoveries. He did not adjust for time as the properties have neither appreciated nor depreciated since sold, apart from the adjustment for the pandemic.

Lifschitz then calculated that the price per square foot for the comparable properties, as adjusted, is $700, which he multiplied by 7,892, the square footage of 1306, yielding a base value of $5,524,400, and assuming the baseline of 9,000 square feet of EDR, he added $3.3 million for "excess FAR development" plus the vacancies, yielding $8,824,400. Lifschitz distinguished the sums added to reach the 9,000 square foot baseline for the EDR from the excess FAR, and denied any double counting of values. Absent the EDR, Lifschitz valued 1306 at $6 million and thus he did not agree that the difference between his appraisals and those of the other appraisers is due solely to his valuation of the air rights.

Lifschitz thus estimated the market value of the property post-pandemic, based on his comparable sales analysis, at $8.7 million.

b. Income capitalization

Lifschitz agreed that the best method of determining the value of an income-producing property is through income capitalization, substantiated by comparable sales. When the two methods yield significantly different results, he assumes that something is missing.

Lifschitz obtained the building's income and expenses from the property manager's profit loss statement and observed that property owners often provide inaccurate information. Thus, he does not "rubber stamp" data received from owners but adjusts it based on his experience and market norms which, according to him, is an accepted methodology in appraising real property, albeit only when the data so warrants.

Lifschitz's sole adjustment to the income obtained from the property manager was the reduction by 10 percent of the rent for unit 3FN which he claimed was above-market. He made adjusted the building's expenses by reducing the annual utility expense for common areas from $2,846 to $2,000, and the 2019 amount for repairs, maintenance, and supplies from $35,199 to $7,700 due to nonrecurring electrical upgrades to the vacant commercial unit that year. Absent pertinent information from the property manager, he used "proforma data" culled from other buildings of the same type which he then averaged to arrive at $7,700. Although Lifschitz acknowledged that the profit and loss statement reflects an expense of $9,068.80 for electrical repairs for 2019, he would not likely alter his adjustment.

While the actual 2019 expense for management fees was $18,339.39, Lifschitz decreased it to $14,802, without explanation, and increased the annual payroll expenses by almost $6,000 as the $613 figure on the statement was plainly inaccurate. Although management's total expense figure is $230,708, Lifschitz entered it as $231,261.75, and then determined that the market projection for operating the building would be $209,983, which he calculated by the

expenses he had adjusted, thereby reducing the total actual expenses incurred in 2019 by some 9 percent. Lifschitz agreed that by reducing the actual expenses, he raised the net operating income.

In appraising the rental income for the vacant commercial unit at $138 per square foot, Lifschitz relied on four comparable rentals, whereas the other two appraisers appraised it at $100 per square foot. And, notwithstanding the exposure time of 9 to 12 months he projected for the sale of the property, which constitutes the entire calendar year of 2020 or from April 1, 2020, which includes the great increase in retail vacancies due to the pandemic, Lifschitz adhered to the projected rent of $138 per square foot for the vacant commercial unit. He was not concerned with how long it had remained vacant, opining that the neighborhood is more significant than the duration of the vacancy.

Lifschitz projected a net operating income of $283,431 for 2021, whereas the actual net operating income for 2019 was $150,415.64, which he had arrived at by projecting a higher income and lower expenses.

In deriving the capitalization rate for the property, Lifschitz relied on rates from four nearby properties:

1024 Second Avenue, sold on March 30, 2020, 4.2 percent;
1031 Second Avenue, sold on November 26, 2019, 4.25 percent;
401 East 57th Street, sold on February 11, 2019, 4.5 percent; and
219-221 East 59th Street, sold on March 11, 2020, 5.61 percent

Lipfschitz adjusted the pre-pandemic rates by one half-point which he characterized as "effectively" a 10 percent decrease in value, as "the city is going to pick up," and chose a capitalization rate of 4.75 percent.

Lifschitz also factored in the vacancy rate for area properties, which he reported as approximately 5 percent as of December 2020 for commercial and residential properties. He took

the 5 percent "off the top," and then deducted all of the expenses to get the net operating income which he divided by 4.75 percent and then compared it with his analysis of the comparable sales, arriving at $9.15 million.

c. Highest and best use

In Lifschitz's opinion, 1306 is underutilized, given its EDR. Thus, he testified, its highest and best use is to modify it and maximize its value by tripling its size, whether by adding to the top or demolishing or rebuilding, which would yield some 15 floors and require an elevator. According to Lifschitz, the building would then bring in three times more revenue although he acknowledged that the project would be expensive and he was unable to address the various requirements for it.

The existing tenancies at 1306 pose no problem to Lifschitz as the leases for 10 of the 12 residential units expire within a year or two and the rent-stabilized tenant could be bought out or remain, in which case the building would not be demolished but added on to, although he acknowledged stating in his appraisal that the highest and best use must be "legally permissible, physically possible, financially feasible, and maximally productive," and he did not know whether all of those conditions could be satisfied.

d. Conclusion

Lifschitz compared the results of his two appraisals, observing that their capitalization rates differ by one-half point, and that the vacancy rate was greater post-pandemic. He also divided the property's "stabilized productive gross income" by the capitalization rate, yielding a value to which he added the EDR, and deducted $110,000 representing the approximate rent loss and $16,000 as the estimated brokerage fee, concluding that the fair market value as of December 2020 is $10.4 million.

III. POST-HEARING MEMORANDA

A. Defendants (NYSCEF 69)

From the legislative mandate that the court order a neutral appraisal to determine the property's fair market value, per RPAPL § 993(6)(c), defendants argue that the determination of the court-appointed neutral is "conclusive in the first instance," absent fraud, bias or bad faith.

As Lifschitz inflated the net operating income and deflated the expenses of 1306, he chose a capitalization rate lower than those chosen by the two other appraisers, and did not sufficiently disclose in his appraisals the adjustments he had made to the comparable sale prices. Defendants thus maintain that plaintiff's appraisal has no probative value, especially given his lack of appraisal experience.

Additionally, plaintiff's failure to obtain an appraisal as of September 24, 2020 violates that "law of the case" as set forth in the amended order appointing the neutral appraiser (NYSCEF 50), and thus, defendants claim that plaintiff's appraisals are without probative value. Moreover, they observe, Lifschitz had not been made aware by Westrock or plaintiff of the court-ordered valuation date.

Defendants also allege that Lifschitz's finding that the best and highest use of the property is as developed is "fundamentally hypothetical," given his admission that he knew not whether construction to the maximum FAR was feasible or whether the rent-stabilized tenant could be bought out. Another basis for disregarding Lifschitz's appraisals, defendants assert, is his "unduly complex process involving patently incomparable vacant land sales data to come to the preposterous value of $734/sq. ft. for excess FAR rights" (emphasis omitted), which he admitted matched no sale in the area or in all of Manhattan. As the other appraisers identified and considered the sales of comparable mixed-use properties with EDRs similar to those of the

property, defendants maintain that Lifschitz's addition of more than $3 million to the EDR resulted in double-counting.

B. Plaintiff (NYSCEF 70)

In light of the uncertainty of the impact of the pandemic on the property's fair market value, plaintiff urges that it be disregarded, and maintains that the sole equitable determination of value is to consider the statute's purpose and that of analogous statutes such as the BCL § 1118. It observes that in order for a party, like it, to assess its risk in seeking partition and a potential buyout, the date as of which the value should be determined is the date of commencement of the partition action. Otherwise, the parties are subject to market uncertainties during the action's pendency. Thus, Lifschitz's 2019 appraisal, the only one requiring no "guesswork" as to the pandemic's impact on the market, should be solely considered, especially as Lifschitz, in contrast to the other appraisers, details "the high demand for properties" to be developed on the upper east side. Plaintiff also notes that Evans stated in his appraisal that there is no legal impediment to developing the property and that New York's "Sliver Law" is not applicable here absent an analysis of its terms. Additionally, plaintiff argues that it is not bound by the valuation date of September 24, 2020 as set forth in the amended order.

Lifschitz's "rigorous" calculations of a baseline for the FARs of the comparable sales, plaintiff contends, affords an "apples to apples" comparison of the other properties, as evidenced by the similar adjusted values arrived at by the other two appraisers, and that Lifschitz's capitalization rate of 4.25 percent is consistent with the historic rates cited by Evans. According to plaintiff, Lifschitz's net operating income analysis for the building is more accurate than the others, as he used his professional judgment in lieu of relying solely on the unverified profit and loss statements provided by management. In any event, none of the appraisers wholly accepted

management's statement.

Plaintiff thus alleges that Lifschitz's 2019 appraisal is the sole objective appraisal and that the fair market value of the building based thereon should be between $11.5 million and $10.4 million. If not, then Lifschitz's 2020 appraisal is best as he utilized a 10 percent adjustment for the pandemic, as did Evans, which is more appropriate than Shlosh's arbitrarily arrived at 25 percent.

Shlosh's appraisal, moreover, is alleged by plaintiff to be unreliable for having used a national capitalization rate without regard to rates on Manhattan's upper east side, and it disputes his vacancy rate of 12.5 percent, claiming that it is unsupported by objective data and is above historical vacancy rates. Plaintiff maintains that Shlosh's rates resulted in his "absurdly low" valuation of $2.95 million which is far lower than both his own comparable sale figure and the price for which plaintiff purchased his interest in the property.

The values reached by Evans based on the price per unit, price per square foot, and EGIM, according to plaintiff, reflect a wide range of $4 million and an almost $2 million spread among them. Alleging that Evans utilized the EGIM as a second income method in order to reduce its sales comparison figures, plaintiff asks that it be disregarded. In any event, it discredits Evans's use of a multiplier below those used for the comparable properties.

Plaintiff also observes that Evans's income valuation of $4 million is approximately half of his sales comparison valuation, thereby demonstrating his use of the wrong capitalization rate, which Evans admitted was not applicable to the comparable properties, but was gleaned from a city-wide capitalization rate. By contrast, Lifschitz employed rates that comport with those on the upper east side and the rates reported in Evans's comparable properties.

Both Shlosh and Evans failed, plaintiff argues, to attribute a proper value to the 13,488

square feet of unused FAR, and unduly discounted the development potential of the building based solely on the pandemic, a proposition with which plaintiff disagrees as air rights do not expire and there is no prohibition to developing the property. It criticizes Shlosh's and Evans's contention that the EDRs of the comparable properties are factored into their values as "far too simplistic."

Plaintiff asserts that Lifschitz's 2020 appraisal is supported by recent sales history, namely, plaintiff's own purchase of its 16.667 percent interest in the building, which plaintiff asserts reflects a "minimum" value of $7.2 million and, with the typical minority discount, reflects a true value of $9 million. Thus, the adoption of Lifschitz's 2020 appraisal warrants a finding that the fair market value of the property is $8.7 to $9.15 million.

IV. ANALYSIS

> Effective December 6, 2019, New York has adopted the "Uniform Partition Of Heirs Property Act" (L.2019, c. 596, § 1), joining eleven other states and the U.S. Virgin Islands in targeting "predatory real estate speculators [who] have taken advantage of New York's laws governing partition actions by purchasing a stake in a residential property--usually after a number of family members have inherited the property--and then using that ownership stake to file a partition action to dispossess the family of the property through a forced sale, often for pennies on the dollar relative to the actual value of the property." Committee Report, 2019 N.Y.S.B. 4865 (NS), June 5, 2019.
>
> The Act has the goal of protecting family-held lands from speculators who acquire properties by leveraging minority interests and applies to any partition action where two or more interested parties are 'relatives' by blood or marriage, no matter how distant. The intent is to allow such relatives holding fractional interests to acquire full ownership or receive full value of their interest in legacy real property through additional service (posting) requirements, court conferencing akin to the settlement conferences in mortgage foreclosure actions, and appraisal requirements.

(Dan M. Blumenthal, Practice Commentaries, McKinney's Cons Laws of NY, Real Property Actions and Proceedings Law § 993).

Fair market value is defined as "the most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair

sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus," as set forth by the American Institute of Real Estate Appraisers and Society of Real Estate Appraisers (*Grandview Heights Ass'n, Inc. v Bd. of Assessors of Town of Greece*, 176 Misc 2d 901, 904–05 [Sup Ct, Monroe County 1998]; Shannon P. Pratt, "What Is Value? Defining Terms in the Valuation of a Business," Fam. Advoc., Spring 1995, at 29 [citing *Uniform Standards of Professional Practice*, Washington, DC: The Appraisal Foundation, 1995]).

Although the term "undue stimulus" is not defined, the definition of fair market value does not encompass consideration of a party's motives or conduct, even if predatory. (*Cf.* Pratt, "What Is Value? Defining Terms in the Valuation of a Business," Fam. Advoc., Spring 1995, at 28 ["In most interpretations of fair market value, the willing buyer and willing seller are hypothetical persons dealing at arm's length, rather than any particular buyer or seller. In other words, a price would not be considered representative of fair market value if influenced by special motivations not characteristic of a typical buyer or seller."]). Consequently, while the circumstances leading to plaintiff's action for the partition of 1306 reflect the scenario that inspired the Legislature to enact RPAPL § 993, the statute mandates that the hearing court determine only the fair market value of the property, apparently without regard to "special motivations." Additionally, "fair market value means the price at which a transaction could be expected to take place under *conditions existing at the valuation date*." (*Id.*, at 29 [emphasis in original]).

To arrive at the fair market value of 1306, all of the appraisals must be evaluated with respect to the factors considered in appraising real property.

A. Credibility and reliability of the appraisals

In addition to Lifschitz's lack of an appraiser's license and relative lack of experience as an appraiser, plaintiff's payment of well over $10,000 to Westrock and Lifschitz and its desire to develop the property may account for the seemingly arbitrary nature of many of the adjustments Lifschitz made to the profit and loss statement of 1306 and to the data reported for the comparable properties. Shlosh's and Evans's appraisals do not suffer by comparison. And while defendants offer no persuasive authority for the proposition that Shlosh's appraisal is conclusive in the first instance, it is the sole neutral appraisal and to that extent may be accorded a degree of greater probative value than the others.

B. As-of date of valuation

Not only did the Legislature provide no guidance for conducting a hearing on fair market value, but as the parties observe, it provided no guidance as to the date as of which the value should be appraised. (*Cf* BCL § 1118[b] [date of valuation of partnership shares for purposes of corporate dissolution is date before commencement of action seeking dissolution]). Given the general rule of statutory construction that the plain meaning of a statute reflects the legislative intent (McKinney's Cons Laws of NY, Book 1, Statutes § 94), and as the Legislature provided a valuation date for BCL § 1118(b), its omission of a date as of which fair market value should be valued pursuant to RPAPL § 993 signals an intention that the hearing court exercise broad discretion in selecting the date, bounded solely by an abuse of discretion. Had the Legislature intended that the hearing court be guided by BCL § 1118(b), it would have so provided.

Absent any cogent argument by plaintiff that the selection of the September 24, 2020 date constitutes an abuse of discretion, it remains the effective date for the neutral appraisal. As only the neutral appraiser was ordered to use the September 24 date, plaintiff was not precluded from

selecting a different date, although its expressed interest in obtaining "apples to apples" comparisons is not advanced by its decision to use December 29, 2020 or the pre-pandemic 2019 date of instead of September 24, 2020.

In light of this broad discretion reposed by the Legislature in the hearing court, the parties' respective litigation strategies are both subject to the whims of fortune, as are decisions respecting real property. Consequently, plaintiff's unknowing risk does not figure into this decision, especially as Lifschitz apparently built into his appraisals adjustments designed to credit plaintiff for that risk.

Moreover, plaintiff's argument that the sole objective appraisal is the one prepared by Lifschitz as of December 23, 2019, and that the fair market value of the building based thereon should be between $11.5 million and $10.4 million, is unreasonable in light of plaintiff's own recognition, just eight months earlier, pre-pandemic, that the fair market value of 1306 was approximately $7.2 million when it purchased its 16.667 percent interest in it, and eight months before when it purchased the very similar property at 1308 Second Avenue for $7 million.

C. Adjustment of value due to the pandemic

Clear-headed consideration of how the pandemic has been managed by governmental entities and citizenry warrants pessimism concerning its continuing impact on New York real estate, notwithstanding Lifschitz's youthful optimism, tempered by his relative lack of experience. If history is a guide, the pandemic's negative impact is bound to stop, only to start and stop again, fueled by new variants, for who knows how long. The pandemic must thus be seriously considered in valuing this property.

Consequently, plaintiff's criticism of Shlosh's reduction of value by 25 percent is not persuasive, notwithstanding Evans's agreement with Lifschitz that a 10 percent reduction in

value due to the pandemic is appropriate. Given Shlosh's neutrality, his determination should be afforded some weight, notwithstanding his reliance on conversations with colleagues. His rejection of using bank adjustments of 5 to 10 percent as a guide is soundly based.

While the Federal Bank of New York's prognostications cited by Evans are compelling, they precede more recent reports of an upswing in virus variants and new infections. (*See* https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html; *see also LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012] ["This Court has discretion to take judicial notice of material derived from official government web sites"]; *People ex rel. Squirrell v Langley*, 68 Misc 3d 498, 508 [Sup Ct, Putnam County 2020] [taking judicial notice of Centers for Disease Control and Prevention guidelines and advisories relating to COVID-19 pandemic]; *People v Matias*, 68 Misc 3d 352, 366 n 17 [Sup Ct, Bronx County 2020] [taking judicial notice of data provided by the Center for Disease Control]).

For these reasons, a more reasonable 15 percent reduction of value due to the pandemic is warranted under the circumstances.

Plaintiff's argument that the absence of sales of comparable properties since February 26, 2020 "demonstrates a general consensus among property owners that the value of their real property is far greater than what they might be able to obtain in the current market" is disregarded as pure sophistry. An absence of real property deals may be attributable to many factors, and an owner's belief that a property warrants a higher sale price does not disprove that properties remain unsold due to a fear of investing during a pandemic, when uncertainty reigns. Additionally, plaintiff's assertion that the Legislature intended that no party to a partition action governed by RPAPL § 993 be burdened or benefitted by "temporary aberrations in the market that might occur" is not only unsupported but is contrary to the definition of fair market value as

the price at which a transaction could be expected to take place under conditions existing on the valuation date.

D. Comparable sales

To evaluate the appraisers' comparable sales, it must first be determined whether the data on which they rely is sufficiently comparable to 1306. As Evans observed in his appraisal, "[a]ny dissimilarities, such as size, location, condition and date of sale are reconciled through the process of adjustments" (NYSCEF 66, at 58), although he also observed that "[t]hose sales requiring the least number of adjustments are usually the most similar to the subject and therefore, provide the most meaningful indication of value" (NYSCEF 66, at 58).

In Shlosh's opinion, there was no need to adjust the sizes or EDRs of his four comparable properties, each of which is of the same approximate vintage as 1306 and was properly appraised as a leased fee interest. Defendants' argument that the four comparable properties had sold well above market value in aid of development is unsupported.

Like Shlosh, Evans did not adjust the sizes of his six comparable properties and adjusted the EDR for only the property at 205 East 75th Street. He also performed a calculation based on the EGIM which yielded $4.45 million. Not only did Evans testify that he employs this method as an additional indicator of value which is simpler than income capitalization, but Lifschitz offered no basis for his accusation that Evans employed it for the sole purpose of coming to a lower valuation. Evans also estimated the per unit value of 1306 as $575,000, and that the value per square foot is $840, yielding, respectively, $8.05 million for the 14 units, and $6.63 million for the 7,892 square feet. He blended all of these figures and concluded that the comparable sales yield a value for 1306 of $5 million.

Lifschitz's attempt to adjust the EDR of the properties goes too far as his multiplier of

$734 per square foot appears random, as does his addition of $3.3 million, even if the sale of vacant land and the sale of air rights are analogous. Most importantly, no evidence was offered that the actual sale figures of all of the comparable properties do not include their air rights. That air rights are included in the sale prices of all of the comparable properties is supported by the reasonable inference, drawn from plaintiff's purchase of 1308 Second Avenue, that it included the air rights; had it not, plaintiff surely would have offered such evidence in support of its position. And, as Shlosh and Evans agreed that the highest and best use of 1306 is its present improved use, Lifchitz's adjustment of the EDR of each property is unwarranted, especially to the extent of its large impact on value. Absent the $3.3 million, the value is $5.4 million.

Lifschitz's appraisal as of December 23, 2019 is not probative absent a basis for comparing it to the post-pandemic appraisals.

E. Income capitalization

Although all three appraisers agree that the income capitalization method is generally preferred for valuing an income producing property, Shosh's figure of $2.95 million is too low and Lifschitz's $9.15 million figure is disregarded given his many unwarranted adjustments to management's profit and loss statement. Evans's $4 million is also disregarded in favor of his EGIM calculation.

V. CONCLUSION

For their comparable properties, Shlosh and Evans arrived at, respectively $5.13 million and $5 million. Lifschitz's valuation of $8.7 million is reduced by $3.3 million to $5.4 million, for the reason stated *supra*, at IV.E. The average of these four valuations is $5.177 million.

No further adjustment for the pandemic is needed as the appraisers' reductions average out at 15 percent. This decision constitutes the notice of value required by RPAPL § 993(6)(g).

Accordingly, it is hereby

ORDERED, that the fair market value of 1306 Second Avenue is $5.177 million; and it is further

ORDERED, that on or before June 3, 2021, pursuant to RPAPL § 993(7)(b), defendants may give notice to the court of the total amount of percentage interests subject to purchase that they elect to buy.

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4/16/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 12

3 - X

4 2ND AVE HOLDING LLC,

5 Plaintiff,

6 - against -

7 NORMAN LOWENBRAUN and RENATA LOWENBRAUN,
Trustees of the NATHAN LOWENBRAUN IRREVOCABLE TRUST,
8 WENDY S. LEWIT and LESLIE LEWIT MILNER,

9 Defendants.

10 - X
Index No. 162426/2019
11
March 4, 2020
12 60 Centre Street
New York, New York 10007
13
B E F O R E: THE HONORABLE BARBARA JAFFE, Justice
14
A P P E A R A N C E S:
15
GINSBURG & MISK
16 Attorneys at Law
215-48 Jamaica Avenue
17 Queens Village, New York 11428
BY: ANTHONY R. JACKSON, ESQ.
18 JOSEPH GILLETTE, ESQ.

19 WACHTEL MISSRY
Attorneys at Law
20 885 Second Avenue
New York, New York 10017
21 BY: STEVEN J. COHEN, ESQ.

22

23

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Terry-Ann Volberg, CSR, CRR
25 Official Court Reporter

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1 THE COURT: Mr. Cohen, I will hear you.
2 MR. COHEN: Good morning, your Honor.
3 I represent the defendant movants in this matter,
4 Norman Lowenbraun, Renata Lowenbraun, the Trustees of the
5 Nathan Lowenbraun Irrevocable Trust, Wendy Lewit and Leslie
6 Lewit Milner.
7 Your Honor, this is a case under a new law, RPAPL
8 Section 993, Uniform Partition of Property Heirs Act, which
9 is tailor made for the situation we have here.
10 My clients are two families whose fathers owned
11 the property in question for about 50 years. They inherited
12 the property, and they have used it as income-producing
13 property since that time. This situation falls squarely
14 within the definition of heirs property under the new
15 Section 993(1)(e).
16 There are several elements for the definition of
17 heirs property, and they are all met here. They are laid
18 out in the brief. Namely, there is no record, there is no
19 agreement for tenancy-in-common between the codefendants,
20 and the cotenants acquired title from the relative, whether
21 living or deceased, and any of the following applies,
22 20 percent or more of the interest are held by cotenant or
23 relatives, and that is the situation here. Both Ms. Lewit
24 and Ms. Milner are sisters, and they inherited their
25 interest in the property from their father, the late Warren.

1 There is no dispute that this is heirs property as
2 defined under the new statute, and because it is heirs
3 property the statute follows a very strict and clear regimen
4 as to what is to happen next. That's the purpose for the
5 order to show cause, and we've laid out the steps under this
6 brand new law of what has to happen.
7 Namely, we need, once the Court determines that
8 this is, in fact, heirs property, which it is, a notice must
9 issue under RPAPL Section 993(7)(a) identifying -- a notice
10 to all the parties saying they have a right to purchase the
11 interest of the plaintiff. The plaintiff by virtue of
12 having brought this suit must sell. There's no ifs, ands or
13 buts about that under the brand new law.
14 Now, the plaintiff has, in opposition to this
15 motion, submitted an affirmation from Mr. Ginsburg, counsel,
16 and an affidavit from a Moses Levy, a principal of the
17 plaintiff 2nd Avenue Holding I LLC.
18 As indicated in our moving papers, Mr. Levy
19 started contacting my clients even before he acquired his
20 16.66 percent interest in the property last April. He
21 started this campaign of harassment, and contacting,
22 solicitations because, so he said, he had acquired an
23 interest in the neighboring property on Second Avenue, and
24 had a development scheme in mind, and he wanted to buy them
25 out.

1 This is exactly the type of situation in which
2 this new law fortunately protects long-time owners who
3 inherited property against. This is tailor made for the
4 very situation we are in now.
5 My clients are not interested in selling the
6 property. They've owned it, the two families, for 50 years,
7 and we tried in good faith to negotiate a purchase of
8 Mr. Levy or the plaintiff's interest to no avail. He
9 started sending threatening letters and e-mails as to why he
10 will not sell, and then brought this brought, but by
11 bringing this lawsuit, as I said long ago, he triggered the
12 application of this brand new law, and plaintiff must sell
13 under Section 993.
14 So the other arguments by the plaintiff is that
15 heirs -- the new law shouldn't apply because it's not what
16 the legislative intent was, my clients aren't poor widows or
17 orphans, and, therefore, shouldn't get the benefit of the
18 new law. That's not what the law says. There's no such
19 exemption for a person like plaintiff's principal who bought
20 his interest in this property as a business venture to buy
21 out the neighboring property. There is no such exemption
22 written into the law and the Court cannot write into it that
23 exemption itself.
24 We have a strict statutory regimen of what's to
25 happen here, and that is that notice should go out to all

1 parties who have interest in the ownership of the property,
2 and there are four right now, the plaintiff and the three
3 defendants, okay. The three defendants own 83 plus percent
4 interest as tenants-in-common in the property and the
5 plaintiff owns 16.66 percent.
6 So the notice is just a formality, the statute
7 requires it, and the notice should go out telling the
8 parties that they have a right to participate in this
9 proceeding, and if the defendant, the cotenants want to
10 purchase the 16.66 percent interest of the plaintiff they
11 can do so.
12 The law also requires that a mandatory settlement
13 conference be set within 60 days of the filing of the RJI,
14 according to my calendar that would be March 31, 2020, and
15 that mandatory settlement conference requires the parties to
16 try to negotiate in good faith a resolution short of a sale.
17 We want that to happen as quickly as possible.
18 The reason why we want that to happen as quickly as possible
19 is because this property is on Second Avenue between 69th
20 and 70th Streets and consists of a dozen residential units
21 and two commercial spaces. The two commercial spaces
22 consist of one tenant who has been a tenant in occupancy for
23 about 40 years, a very good tenant, and that tenant has
24 expressed an interest in modifying the terms of its lease,
25 and my clients, the managing agent for the entire property,

1 wants to pursue that amendment and make this longstanding,
2 very good, reliable client happy. Plaintiff doesn't want to
3 have anything to do with that.
4 Moreover, the second commercial space is vacant,
5 has been vacant for some time. My clients, through a
6 broker, Cushman & Wakefield, are actively trying to find
7 tenants, a tenant for that space. Plaintiff has written to
8 me, my client, saying we are not interested in leasing, the
9 property is more valuable if it's vacant, and that's not
10 what our clients want, we want to move this process forward.
11 Moreover, as I brought to the Court when counsel
12 for plaintiff asked for an adjournment of this order to show
13 cause, which your Honor denied, I included e-mails recently
14 received from plaintiff threatening to put a lien on the
15 property as a further leverage attempt to dissuade my
16 clients from pursuing their rights under this new law.
17 So as part of your Honor's thinking, we would like
18 an additional order saying that there can be no such lien
19 placed on a property during the pendency of this action.
20 That would obviously defeat the purpose of the statute, and
21 the strict statutory regime and regimen introduced by the
22 legislature under RPAPL 993.
23 So that's it in a nutshell. This is a clear,
24 nicely fit, tailor made fact pattern of the application of
25 the new law, and we just ask that your Honor follow the

1 statute, declare that this is heirs property, and get the
2 ball rolling so we can proceed to buy out the plaintiff's
3 interest for fair market value as set forth in the statute.
4 THE COURT: Thank you.
5 Mr. Gillette, why isn't this governed by 993? Why
6 isn't it tailor made?
7 MR. GILLETTE: Judge, again, I don't really have
8 an issue with the procedures once your Honor finds or if
9 your Honor finds that the statute is applicable.
10 THE COURT: Why isn't it?
11 MR. GILLETTE: It is not because, again, the
12 legislative intent, the Court is invited, it has the power
13 to interpret, it talks about predatory speculation on
14 residential properties where a speculator is looking to take
15 advantage of a homeowner in possession and pays pennies on
16 the dollar to buy them out, and they have no means to kind
17 of combat that. That's in my papers and it's in counsel's
18 papers. So, again, this is a brand new statute. The Court
19 always has that ability to interpret when it's applicable
20 and when it's being misused.
21 None of the circumstances that this statute was
22 put in place to combat are present here. Without getting
23 into all of the characterizations of counsel about good
24 faith, my client has offered way beyond what we all agree,
25 what they agree the appraised value of the property is here.

1 This is not predatory. These are businessmen.
2 The statute is not meant to circumvent the normal right to
3 partition if it doesn't fall under the circumstances for
4 which it was put into play.
5 Again, that legislative intent is clear. It
6 recites what triggers it. We all know what triggers it. It
7 triggers on a residential property with speculators going
8 around taking advantage of people who have no means to
9 combat it and trying to lowball them.
10 None of this is present. It's evident not only in
11 my papers, but it's evident in plaintiff's papers.
12 THE COURT: Thank you.
13 Anything further?
14 MR. COHEN: Just simply, Judge, there's no
15 statutory authority holding for the argument counsel's made.
16 It is not cited in his papers. The law is clear, this is
17 heirs property.
18 (Continued on next page for certification.)
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1 THE COURT: I will check it out.
2 It is your application. I am going to ask you to
3 e-file this oral argument within three weeks.
4 I don't believe I have your opposition in hard
5 copy.
6 MR. GILLETTE: It was dropped off.
7 THE COURT: Listen.
8 Please give all copies of everything except
9 exhibits to Mr. Casper, not to me.
10 Thank you.
11 ***
12 C E R T I F I C A T E
13 I, Terry-Ann Volberg, C.S.R., an official court reporter of
14 the State of New York, do hereby certify that the foregoing
15 is a true and accurate transcript of my stenographic notes.
16
17 Terry-Ann Volberg, CSR, CRR
18 Official Court Reporter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

---------- X

2ND AVE HOLDING 1 LLC,

INDEX NO. 162426/2019

Plaintiff,

- v -

NORMAN LOWENBRAUN, RENATA LOWENBRAUN, WENDY LEWIT, LESLIE LEWIT MILNER,

Defendants.

---------- X

~~[PROPOSED]~~ AMENDED ORDER APPOINTING REAL ESTATE APPRAISER AND APPRAISAL

The Court having convened the mandatory settlement conference required by RPAPL § 993(5), and in accordance with its Order and Notice of Settlement Conference entered on July 8, 2020 (NYSCEF 39); and

The parties, having been unable to reach a settlement at the mandatory conference, were directed by the Court to submit letter memorandum regarding further scheduling, and the parties having done so (NYSCEF 43 and 44);

NOW, THEREFORE, pursuant to RPAPL § 993(6)(d), it is hereby

ORDERED, that the Court appoints Marianne Mueller of Mueller Lang & Associates, LLC, 370 First Avenue, Suite 6C, New York, NY 10010, marianne@muellerlang.com, a disinterested real estate appraiser licensed in New York State, to appraise the fair market value of the property known as 1306 Second Avenue, New York, New York (block 1443, lot 51) (property); assuming ~~sole~~ ownership of the fee simple estate; it is further

ORDERED, that the appraiser shall file a sworn or verified appraisal with the Court on or before Sept. 25, 2020]; and provide electronic copies to counsel for plaintiff and defendants; it is further

ORDERED, that pursuant to RPAPL § 933(6)(e), not later than ten (10) days after the appraisal is filed with the Court, the Court shall send notice to counsel for plaintiff and defendants stating: (i) the appraised fair market value of the property plus the allowed cost of the appraisal; (ii) that the appraisal is available at the clerk's office; and (iii) that a party may file

with the court an objection to the appraisal not later than thirty (30) days after the notice is sent, stating the grounds for the objection; it is further

ORDERED, that not later than thirty (30) days after the Court sends notice to the parties pursuant to RPAPL § 933(6)(e), any party may offer other evidence of value that they wish to present at the hearing to be held pursuant to RPAPL § 993 (6)(f); it is further

ORDERED, that the cost of such appraisal shall be paid 50% by plaintiff and 50% by defendants; and it is further

ORDERED, that the ultimate responsibility for appraisal costs shall be determined by the Court at the conclusion of the matter. Counsel and the parties are further directed to supply the appraiser with all requested information forthwith. The appraiser is directed to contact the Court if any difficulty arises in complying with the report due date, if the required information is not forthcoming within three (3) weeks of the date of this order or if payment is not received as provided herein.

BARBARA JAFFE, JSC 8/27/2020
amended 9/16/2020

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** IAS MOTION 12
Justice

----------X

2ND AVE HOLDING 1 LLC,

Plaintiff,

- v -

NORMAN LOWENBRAUN, RENATA LOWENBRAUN, WENDY LEWIT, LESLIE LEWIT MILNER,

Defendants.

----------X

INDEX NO. 162426/2019

Pursuant to RPAPL 993(6)(e), and upon the receipt by the court on November 20, 2020 of the required verifications of the court-ordered appraisal of the property in issue, notice is hereby given to the parties that:

1) the fair market value of the property in issue, appraised as of September 24, 2020, by David M. Shlosh, MAI, and Marianne T. Mueller of Mueller Lang & Associates, LLC 370 First Avenue, Ste. 6C, New York, NY 10010, is four million dollars ($4,000,000);

2) the allowed cost of the appraisal is $6,000, borne equally by the parties;

3) the appraisal is available at NYSCEF 54; and

4) any objections to the appraisal must be efiled with supporting grounds within 30 days after the sending of this notice, or by December 24, 2020.

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DATE: 12/2/2020 **BARBARA JAFFE, JSC**

Check One: ☐ **Case Disposed** ☐ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**

OTHER ORDER – NON-MOTION

GPW 83

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

2ND AVE HOLDING 1 LLC, Plaintiff, -against- NORMAN LOWENBRAUN and RENATA LOWENBRAUN, Trustees of the NATHAN LOWENBRAUN IRREVOCABLE TRUST, WENDY S. LEWIT and LESLIE LEWIT MILNER, Defendants.	Index No. 162426/2019 (Hon. Barbara Jaffe, J.S.C.)

DEFENDANTS' POST-HEARING MEMORANDUM

WACHTEL MISSRY LLP
One Dag Hammarskjold Plaza
885 Second Avenue, 47th Floor
New York, New York 10017
(212) 909-9500

Attorneys for Defendants Norman Lowenbraun and Renata Lowenbraun, Trustees of the Nathan Lowenbraun Irrevocable Trust, Wendy S. Lewit, and Leslie Lewit Milner

GPW 84

Defendants respectfully submit this memorandum following the hearing conducted on March 10, 11 and 12, 2021 (the "Hearing") to determine the fair market value ("FMV") of the property known as 1306 2nd Avenue, New York, New York (the "property") pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 993(6).

HEARING TESTIMONY

Mueller Lang & Associates, LLC ("MLA"). The first witness at the Hearing was David Shlosh, for the court-appointed appraiser, MLA. Shlosh is a licensed appraiser and Member of the Appraisal Institute (MAI) with 30 years' experience performing valuations. Shlosh determined that the highest and best use of the property was continued use as mixed apartment and retail. Shlosh prepared the MLA appraisal report and concluded that the property's FMV is $4,000,000 as of 9/24/20, the court-ordered valuation date. DX1 at 59. Since the property is income producing, MLA gave primary consideration to the income capitalization approach, and Shlosh testified extensively about how it was employed. 3/10 Tr. 27; DX1 at 40-59. For the income capitalization approach, MLA arrived at net operating income (NOI) of $177,248, based on stabilized income ($411,102) and expenses ($233,854), less vacancy and collection loss, and applied a capitalization rate of 6%, for an indicated value of $2,964,127. DX1 at 57. For the sales comparison approach, Shlosh considered comparable sales data, and applied a downward market adjustment of 25% to account for the fact that a sale of the property on 9/24/20 means the property would have been on the market during the Covid pandemic period (*i.e.*, during an estimated 9 months "exposure time" preceding the valuation date). 3/10 Tr. 40-41. Shlosh further testified about the concept of excess FAR development rights (*i.e.*, air rights), and how MLA identified and relied on sales comparables that sold with similar air rights (in the range of 10,000-15,000 excess FAR sq. ft.) to those of the property (which has 13,488 excess FAR sq. ft.), for an indicated value of $5,130,000, before reconciling with the income approach. 3/10 Tr. 35-36, 61-62, 76; DX1 at 40.

Property Appraisal Services LLC ("PAS"). The next witness was Richard Evans, principal of Defendants' independent real estate appraiser PAS, who prepared the PAS report. Evans is an

appraiser duly licensed in NY, NJ, and CT, having conducted over 1,000 appraisals in his 30 years' experience. 3/10 Tr. 137; DX6 at 95. The valuation date of the PAS appraisal was 9/24/20, per court order. PAS separately arrived at the same $4,000,000 value conclusion as MLA. DX6 at 88. Like MLA, PAS concluded that the highest and best use of the property is as the mixed apartment and retail building as currently improved. 3/10 Tr. 140; DX6 at 85. Like MLA, Evans emphasized the income capitalization approach for the income-producing property, backed by the sales comparison approach. 3/10 Tr. 105-06. For the income capitalization approach, PAS arrived at a NOI of $203,293, based on stabilized income ($445,027) and expenses ($241,734), and applied a capitalization rate of 5%, for an indicated value of $4,001,866 adjusted for vacancy and collection loss. DX6 at 85; 3/10 Tr. 115-19, 137-38. For the sales comparison approach, PAS considered comparable sales data, and applied a downward market adjustment of 10% to account for an estimated 12-month exposure time spanning the Covid pandemic and several months preceding its onset (9/2019 to 3/2020). DX6 at 60. Like MLA, PAS identified and relied on comparable properties that sold with similar excess FAR rights to those of the property, arriving at an indicated value of $5,000,000, before reconciling with the income approach. Tr. 107; DX6 at 60.

Westrock Appraisal Services Corp. ("Westrock"). The final witness was Joseph Lifschitz, assistant appraiser for Westrock, Plaintiff's appraiser. Lifschitz, who is not a licensed appraiser, chiefly prepared the Westrock reports, in consultation with his superior Steven Romer. 3/10 Tr. 146; 3/11 Tr. 4-5. Westrock submitted appraisals as of 12/29/19 and 12/23/20—neither of which were the court-ordered valuation date. In contrast to MLA and PAS, Westrock appraised the property at double and nearly triple the conclusion of the preceding witnesses: $9,150,000 as of 12/29/20 (DX4 at 131) and $10,400,000 as of 12/29/19 (DX3 at 120). Whereas MLA and PAS each made modest adjustments to the property's actual income and expenses to arrive at NOI, for its income capitalization approach in the 2020 report, Westrock arrived at the highest NOI of $283,431, based on inflated income ($493,414) and deflated expenses ($209,983), while selecting a capitalization rate of 4.75%, lower than that of MLA or PAS (a lower cap rate yields a higher

indicated value). 3/11 Tr. 7-22; DX4 at 125. On the sales comparison approach, Lifschitz repeatedly demonstrated that the Westrock reports failed to adequately disclose upward adjustments made to account for excess FAR to the "Sale Price" listed in Westrock's comparable sales data summaries. 3/12 Tr. 14-19; DX4 at 62, 75. Moreover, Westrock's 2020 report assigned an additional $3,300,000 value to those same excess FAR rights in the final analysis of both its income capitalization and sales comparison approaches. 3/11 Tr. 28-31; DX4 at 125, 77.

DISCUSSION

A. The Court-Appointed Appraiser's Determination of Value Is Conclusive

RPAPL § 993(6)(c) provides that, unless the parties agree or the court determines the cost impractical, "the court shall order an appraisal by a disinterested real estate appraiser licensed in this state to determine the FMV of the property."[1] Inasmuch as the statute provides that the court "shall" order and appoint an appraiser "to determine" the value of the property, the determination by such court-appointed appraiser is conclusive in the first instance. Here, the $4,000,000 fair market valuation made by the curt-appointed appraiser should control absent fraud, bias or bad faith.[2] Here, there was no evidence of fraud, bias or bad faith despite rigorous cross-examination by counsel. Accordingly, there is no reason to depart from MLA's $4,000,000 value determination.

B. The Weight of the Evidence Establishes that the FMV of the Property Is $4,000,000

Even taking into consideration all the evidence adduced at the Hearing, the FMV of the property is $4,000,000. The only evidence suggesting a different FMV are the Westrock appraisals, which should be accorded no weight. First, while Shlosh and Evans have some 60 years of appraisal experience between them; Lifschitz, on the other hand, has yet to attain his appraiser's license. While Plaintiff sought and obtained an adjournment of the Hearing dates, in part to accommodate Romer's attendance, he mysteriously failed to appear, sending his assistant to testify instead. Second, Westrock failed to present ***any evidence*** of the FMV of the property as of the court-ordered valuation date, 9/24/20. Plaintiff urged the Court to fix the valuation date to the date

Plaintiff commenced this case, 12/23/19. The Court rejected that entreaty, and its ruling is memorialized in its Amended Order dated 9/16/20 (DX14), after both sides had made multiple written submissions and the Court held remote argument on the issue (DX9-DX13). Plaintiff's time to notice an appeal from the Amended Order has long elapsed (*see* DX15), and that ruling is law of the case. Inasmuch as Plaintiff submitted a second appraisal as of 12/29/20—another date entirely of its own choosing—that appraisal is likewise devoid of probative value. Remarkably, Lifschitz ***was not even aware*** of the court-ordered 9/24/20 valuation date, taking direction instead from plaintiff's principal. 3/11 Tr. 28-29. Accordingly, the Court should afford all the evidentiary weight that the Westrock appraisals are due: precisely none.[3] Third, the entire premise of Westrock's value analysis is fundamentally hypothetical.[4] Westrock concludes that the "highest and best use" of the property is to build new construction up to the maximum FAR. But Lifschitz admitted he does not even know if construction is possible—he did not consult an engineer or an architect and assumes he can easily achieve a buyout of the rent-stabilized tenant. Fourth, Westrock's appraisals cannot be relied on because its methods are completely unreliable. Lifschitz testified that he divined and substituted his own numbers in place and stead of actual numbers reported by management or recorded in the City register, without adequate disclosure or explanation. Lifshitz undertook an unduly complex process involving patently incomparable vacant land sales data to come to the preposterous value of ***$734/sq. ft.*** for excess FAR rights (DX4 at 80-92)—a figure he conceded did not match any sale he was aware of in the subject neighborhood, let alone anywhere in Manhattan. 3/12 Tr. 19-20. Not only did Westrock obscure upward adjustments for excess FAR within its summary data of sales comparables (3/12 Tr. 14-19; DX4 at 62, 75), Westrock then tacked on an ***additional $3.3-3.575 million*** for those same excess FAR rights in its final analysis. 3/11 Tr. 28; DX4 at 125, DX3 at 114. By contrast, the two licensed appraisers, Shlosh and Evans, identified and considered sales of comparable mixed-use properties that sold with excess development rights similar to those of the property's 13,488 excess FAR. DX1 at 40; DX6 at 60. The Court should give no weight to Westrock's appraisals.[5]

CONCLUSION

For all these reasons, and as Defendants established at the Hearing, the Court should determine the FMV of the property is $4,000,000.

Dated: New York, New York
March 26, 2021

WACHTEL MISSRY LLP

By: _____
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Stella L. Sainty
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Attorneys for Defendants Norman Lowenbraun and Renata Lowenbraun, Trustees of the Nathan Lowenbraun Irrevocable Trust, Wendy S. Lewit, and Leslie Lewit Milner

ENDNOTES

[1] Contrary to Plaintiff's counsel's suggestion, the statute does not require the determination of FMV to be based upon assuming, contrary to reality, that the property is unencumbered by a rent-stabilized lease (and thus, a tenant entitled to renew their lease and remain indefinitely). RPAPL § 993(6)(d) provides that the determination of value by a disinterested appraiser appointed by the court "shall assume sole ownership of the fee simple estate." In other words, the statute specifies that the appraiser shall determine the property's value assuming the property was held by a single fee owner, rather than by multiple one co-tenants each holding fractional interests, which would be the usual case in any action for partition.

[2] In New York, parties who agree in their lease to submit disputes over valuation of the property for determination by an appointed appraiser may not thereafter contest the determination absent fraud, bias or bad faith. *Rice v Ritz Assocs.*, 88 AD2d 513, 514 (1st Dept 1982) ("All that we may be concerned with is whether the appraisers acted honestly and in good faith, in the exercise of their wide discretion as to methods of procedure and sources of information."), *aff'd* 58 NY2d 923 (1983); *see also Perlbinder v Jakubovitz*, 239 AD2d 294, 295 (1st Dept 1997) (granting summary judgment to plaintiffs where "record failed to indicate any evidence of fraud, bias, or bad faith on the part of defendant").

[3] *See, e.g., Northville Indus. Corp. v Bd. of Assessors of Town of Riverhead*, 143 AD2d 135, 136 (2d Dept 1988) ("Both of the board's experts violated the cardinal principle of valuation that real property should be valued according to its condition on each tax status date."). Cases involving determinations of fair market value where a property tax assessment is challenged under Real Property Tax Law Article 7 are instructive. There, in the first instance, the tax assessor's valuation is presumed to be valid, which may be overcome upon showing "substantial evidence" that the valuation is erroneous. In those cases, as here, a government-appointed neutral is tasked with the FMV determination in the first instance, which would be a waste of public time and resources unless accorded some deference.

[4] *See, e.g., Adirondack Mountain Rsrv. v Bd. of Assessors of Town of N. Hudson*, 99 AD2d 600, 601 (Dept), *aff'd sub nom.* 64 NY2d 727 (1984) ("Value is determined by assessing the condition of the property according to its state on the taxable status date, without regard to future potentialities or possibilities, and may not be assessed on the basis of some use contemplated in the future.")

[5] *See, e.g., Bd. of Managers of French Oaks Condo. v. Town of Amherst*, 23 NY3d 168, 177, (2014) (petitioner condominium board of directors failed to rebut presumptive validity of tax assessment because its appraiser failed, among other things, to have confirmable data to support his findings); *Guilderland Ctr. Nursing Home, Inc. v Town of Guilderland Bd. of Assessment Rev.*, 195 AD2d 902, 904 (3d Dept 1993) (upholding court's finding giving little weight to conclusions of a witness who was unable to explain the basis for the figures upon which he relied, or to supply any independent confirmation of their accuracy, as might be provided by someone familiar with local building costs). *See also John P. Burke Apts., Inc. v Swan*, 137 AD2d 321, 325 (3d Dept 1988) (appraisers' failure to specify or explain adjustments vitiates probative value of the appraisal); *Matter of Acquisition of Real Property by County of Dutchess*, 186 AD2d 891, 891-92 (3d Dept 1992) (same); *and see Center Albany Assocs. LP v Bd. of Assessment*, 151 AD3d 1422-24 (3d Dept 2017) (upholding Supreme Court's adoption of petitioner's expert valuation, which was based on actual income and expenses, as more reliable and supported by record evidence than that of respondent's expert, whose valuation diverged significantly from actual numbers, and was accorded no weight).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x
2ND AVE HOLDING 1 LLC,

Plaintiff,

Index No: 162426/2019

-against-

NORMAN LOWENBRAUN and RENATA LOWENBRAUN, trustees of the NATHAN LOWENBRAUN IRREVOCABLE TRUST, WENDY S. LEWIT, and LESLIE LEWIT MILNER,

Defendants.
----------x

PLAINTIFF'S POST HEARING BRIEF

GINSBURG & MISK LLP
Attorneys for Plaintiff
215-48 Jamaica Avenue
Queens Village, New York 11428
(718) 468-0500

OF COUNSEL:
CHRISTOPHER RYAN CLARKE

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PRELIMINARY STATEMENT

The Court should not consider the effect of Covid when determining the property's fair market value ("FMV"), particularly since the effect is so uncertain. Thus, FMV should be determined as of the commencement date of the action. As RPAPL 993 is silent regarding the FMV date, the only equitable way to determine the valuation date is to look to statutory purpose and analogous statutes, such as the BCL, which set the valuation date as the day before the complaint is filed.

Valuation as of the commencement date is the only way for a party to determine whether to take the risk of filing a partition action and potential buyout. Tying FMV to any other date would subject both buyers and sellers to market uncertainties during the pendency of the action. It could not have been the intent of the Legislature that the ultimate determination of FMV depends on how fast the matter got to an appraisal. Moreover, in setting the appraisal date for Mueller Lang ("ML") as the date of its inspection, the Court did not rule that same would be the dispositive date for final determination of FMV. (NYCEF # 50). This is particularly so because the statute does not require the Court to take the appraisal or appraisal date as gospel. The issue of the premises' FMV, including the valuation date, remains open.

In fact, the only consensus between the three testifying appraisers is that the effect of Covid on the prices of NYC real estate is essentially unknown. Scant market information exists to establish what effect, if any, Covid will have on either the short or the long-term value of Manhattan real estate. Indeed, the lack of comparable post-Covid sales demonstrates that FMV should not be determined through appraisals of the current market.

In sum, it would be manifestly inequitable to set a buyout value based on a future unknown market, as opposed to the market in which Plaintiff placed its interest for sale by commencing this partition action. To do so here would give the Defendants a sizable windfall, potentially setting a precedent harmful to heirs proceeding under RPAPL 993.

OPTION 1: ADOPT WESTROCK'S 2019 REPORT

The Court should adopt Westrock's 2019 report ("W-19") as its FMV conclusion. It is the only report that does not ask the Court to engage in the uncertain guesswork of determining Covid's effect on market values. Further, the substance of Westrock's valuation process is the most thorough and complete of all the appraisals. Westrock's report appropriately accounts for the true highest and best use of the property. It details the high demand for properties that can be developed in the Upper East Side (W-19 at 24), and the continued demand for rentals in this neighborhood (W-19 at 28). None of the other reports even attempt this. They simply dismiss development of the property due to the Covid pandemic, which is both finite and waning. (PAS at 55, ML at 22-23).

As PAS admits in its report, there is no legal impediment to developing this property. (PAS at 52). Defendants' counsel's suggestion that New York's "Sliver Law" might apply to the property is not supported by the record. The application of the Sliver Law is a highly fact specific analysis with multiple exemptions that this Court cannot simply apply on this record.

Westrock's rigorous calculations set a baseline floor area ratio ("FAR") of comparable sales to give the Court an "apples to apples" comparison of other properties' values. Westrock's adjustments are actually supported by ML and PAS, which arrive at adjusted per square foot prices for comparable properties consistent with those found by Westrock. (PAS at 60, ML at 40).

Unlike the other appraisers, Westrock applied capitalization ("cap") rates from the relevant market to arrive at a cap rate of 4.25% that is in line with the historic local cap rates cited by PAS. (PAS at 60). Westrock also provided the most accurate net operating income analysis. It used its professional judgment to determine realistic annual expenses, rather than simply adopting the defendants' unverified profit and loss statements. In fact, none of the appraisers simply accepted the profit and loss statements whole cloth, as evidenced by Defendants' Demonstrative Exhibit 3.

Because the 2019 Westrock report is the only report that presents an objective FMV properly based on a baseline sales comparison approach and a realistic income analysis, the Court should adopt Westrock's conclusions and set a FMV between $11.5 and $10.4 million.

OPTION 2: ADOPT WESTROCK'S 2020 REPORT

If the Court decides that notwithstanding Covid's temporary and uncertain effect, the appropriate valuation date is in 2020, it should rely on Westrock's 2020 report and reject the ML and PAS reports.

The weight of the expert testimony confirms that Westrock's 10% Covid adjustment was an appropriate estimate of the market impact based on its knowledge of the market and numerous appraisals performed for banks during Covid. PAS applied the same 10% reduction. (PAS at 60, 67). Conversely, ML's 25% Covid reduction is arbitrary and based on little more than the conjecture of others. (ML at 28-29). Indeed, to accept such a reduction would mean that a property worth $1 million pre-Covid is worth $750,000.00 now - the lack of sales during the past year does not demonstrate that there has been such a precipitous drop in value.

ML's report is likewise unreliable because it used a national cap rate based on data from Tacoma to Tallahassee; this has no bearing on properties in the Upper East Side. (ML at 55-56). Its vacancy rate of 12.5% was similarly unsupported by any objective data and above historical vacancy rates. (ML at 53). Both errors resulted in ML's absurdly low $2.95M valuation under the income approach. Not only is this value far out of line with its own sales comparison valuation of $5.13 million, evidencing a clear issue with the appraisal, simply considering the wide delta between the $7.2M valuation at which Plaintiff recently acquired its interest and ML's income valuation demonstrates how out of sync the ML report is with reality.

Finally, the PAS report should have been rejected as untimely and in contravention of the statutory requirements. In any event, the Court should reject PAS's report because it is simply too

inconsistent to be reliable. For example, in its sales comparison, PAS arrives at values of $8,050,000 based on price per unit, $6,629,280 based on price per square foot and $4,450,270 based on EGIM. The mere fact that PAS's three different approaches have differences of approximately $2M dollars and a range of $4M highlights the problem with PAS' method. Indeed, the Court should reject the application of the EGIM method under the sales comparison approach entirely as it is just a second income approach being used by PAS to inappropriately drag down its own sales comparison conclusions. The error in the EGIM conclusion is exacerbated by PAS' selection of an income multiplier below the range of values that were determined by its own comps. (PAS at 68). It should be rejected outright.

PAS' income valuation conclusion of $4M is approximately half its sales comparison valuation, demonstrating that PAS used the wrong cap rate. This should come as no surprise, as Mr. Evans admitted that he did not use cap rates that are applicable to like properties. (Tr. 3/10/21, P. 122, l. 20- P. 124, l. 10). He used a city wide cap rate and neglected to even consider the cap rates reported from his own sales comps. (PAS at 82). Again, by comparison, Westrock used rates that actually reflect the Upper East Side and line up with the cap rates reported in PAS' sales comps. (Westrock 2020 at 124-25, PAS at 60).

The PAS and ML reports also fail to attribute the appropriate value to the over 13,000 square feet of unused FAR. Both discounted the possibility of development of the building based solely on the Covid pandemic. (PAS at 55, ML at 22-23) . Covid has imposed no prohibition to developing property and even if there were, the premises' air rights have no expiration date.

The PAS and ML reports attempt to excuse their neglect of the properties' air rights by suggesting that their value is "baked in" to the price of their comps which are, according to them, "close enough" in excess FAR. This analysis is far too simplistic. Unlike Westrock, ML and PAS

did not provide the Court with a baseline from which to determine value. Likewise, they neglect to analyze the values of vacant land from which the value of excess FAR is extrapolated. In sum, ML and PAS have failed to properly account for the value of the building's significant excess FAR.

The appropriateness of the Westrock 2020 valuation is likewise supported by the recent sales history. Plaintiff paid $1.2M for a 1/6 interest in the property. (ML at 17). That reflects a minimum valuation of $7.2M, and considering the typical minority discount of 25%, reflects a true value of $9M, directly in line with Westrock's 2020 valuation. *See e.g.,* Congel v. Malfitano, 141 A.D.3d 64, 75, 32 N.Y.S.3d 264, 272 (2d Dept. 2016), aff'd as modified, 31 N.Y.3d 272, 101 N.E.3d 341 (2018) ("We further find the plaintiffs' expert's testimony that a 66% minority discount was appropriate to be credible and supported by the record.").

Based on the foregoing, the if the Court requires a 2020 valuation, it should adopt Westrock's 2020 report and conclude that the FMV is between $8.7 and $9.15 million.

CONCLUSION

The Court should adopt Westrock's 2019 valuation. If the Court decides that a 2020 valuation is appropriate, it should adopt Westrock's 2020 valuation. These are the only equitable outcomes to this proceeding. Plaintiff should not be damaged by Defendants exercising their buyout right, which any lower determination would do. The intent is to help families keep properties in their name, not to hurt investors. Any conclusion below these amounts would unnecessarily damage Plaintiff and provide Defendants an unjust windfall due solely to the Covid pandemic.

Respectfully submitted,

GINSBURG & MISK LLP

By: _____
Christopher Ryan Clarke, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

2ND AVE HOLDING 1 LLC, Plaintiff, -against- NORMAN LOWENBRAUN and RENATA LOWENBRAUN, Trustees of the NATHAN LOWENBRAUN IRREVOCABLE TRUST, WENDY S. LEWIT and LESLIE LEWIT MILNER, Defendants.	Index No. 162426/2019 (Hon. Barbara Jaffe, J.S.C.) **AFFIRMATION OF STEVEN J. COHEN**

Steven J. Cohen, an attorney admitted to practice in New York, affirms pursuant to CPLR 2106 under the penalties of perjury, as follows:

1. I am a member of Wachtel Missry LLP, attorneys for the defendants Norman Lowenbraun and Renata Lowenbraun, Trustees of the Nathan Lowenbraun Irrevocable Trust, Wendy S. Lewit and Leslie Lewit Milner ("Defendants"). As such, I am fully familiar with the matters set forth herein.

2. In accordance with the Supplemental Decision & Order on Motion dated April 16, 2021 (NYSCEF 71) and pursuant to RPAPL§ 993(7)(b), the Notice Pursuant to RPAPL§ 993(7)(b), is e-filed herewith and attached as **Exhibit 1** hereto.

Dated: New York, New York
June 3, 2021

/s/ Steven J. Cohen
Steven J. Cohen

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

2ND AVE HOLDING 1 LLC, Plaintiff, -against- NORMAN LOWENBRAUN and RENATA LOWENBRAUN, Trustees of the NATHAN LOWENBRAUN IRREVOCABLE TRUST, WENDY S. LEWIT and LESLIE LEWIT MILNER, Defendants.	Index No. 162426/2019 (Hon. Barbara Jaffe, J.S.C.)

NOTICE PURSUANT TO RPAPL § 993(7)(b)

In accordance with the Supplemental Decision & Order on Motion dated April 16, 2021 (NYSCEF 71) and pursuant to RPAPL§ 993(7)(b), this is the notice on behalf of co-tenants/defendants that, of the total amount of the 16.667% interest of plaintiff 2nd Ave Holding 1 LLC in the real property known as 1306 Second Avenue, New York, New York (block 1443, lot 51) subject to purchase, defendants collectively elect to buy the entire interest, by each defendant as follows:

Defendant	Percentage Interest Defendant Elects to Buy of the 16.667% Interest Subject to Purchase
Norman Lowenbraun and Renata Lowenbraun, Trustees of The Nathan Lowenbraun Irrevocable Trust	5.0000%
Wendy S. Lewit	5.8335%
Leslie Lewit Milner	5.8335%

Total: 16.667%

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Dated: New York, New York
June 3, 2021

WACHTEL MISSRY LLP

By: /s/*Steven J. Cohen*
Steven J. Cohen
Stella L. Sainty
One Dag Hammarskjold Plaza
885 Second Avenue, 47th Floor
New York, New York 10017
(212) 909-9500

Attorneys for Defendants Norman Lowenbraun and Renata Lowenbraun, Trustees of the Nathan Lowenbraun Irrevocable Trust, Wendy S. Lewit, and Leslie Lewit Milner

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** IAS MOTION 12
Justice

----------X

2ND AVE HOLDING 1 LLC, **INDEX NO.** 162426/2019

Plaintiff,

- v -

NORMAN LOWENBRAUN, RENATA LOWENBRAUN,
WENDY LEWIT, LESLIE LEWIT MILNER

Defendants.

----------X

Pursuant to RPAPL 993(7)(d)(i), all parties are herein notified that defendants have elected, in the aggregate, to buy the total amount of percentage interests in the property subject to purchase, and it is hereby

ORDERED, that the date by which defendants must pay their apportioned price into the court is August 6, 2021.

20210628164132BJAFFE1181C84856014C8B8D85919D30B2CDE2

DATE: 6/28/2021 **BARBARA JAFFE, JSC**

Check One: ☐ **Case Disposed** ☐ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**

OTHER ORDER – NON-MOTION

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Glenn P. Warmuth | Stim & Warmuth, P.C.

Glenn P. Warmuth

GLENN P. WARMUTH attended the State University of New York at Stony Brook and received a BA with honors in Sociology with a minor in Theatre. Mr. Warmuth received his JD from St. John's University School of Law in 1999 as a Dean's List graduate. He is a member of the Suffolk County Bar Association and New York State Bar Association. Mr. Warmuth is admitted to practice in all New York State Courts, the Second Circuit Court of Appeals, the U.S. District Courts for the Eastern, Southern, Northern and Western Districts of New York and the United States Supreme Court. Mr. Warmuth volunteers his time each year to work with elementary, middle and high school students: as co-coordinator for the Suffolk County Regional Competition of the New York State High School Mock Trial Competition, as a judge of the We The People: The Citizen and the Constitution contest and as a judge of the Western Suffolk BOCES Mock Trial Tournament. He has served as the coach for the Holy Angels Regional School Mock Trial Team and served on the Holy Angels school board (2012-2016). Mr. Warmuth also works for the New York State Unified Court System as an arbitrator in Suffolk County District Court where he decides small claims cases.

Suffolk County Bar Association

- Co-Coordinator - Suffolk County High School Mock Trial Tournament (2016-Present)
- Board of Directors - Director (2012-2015)
- Suffolk Academy of Law - Officer (2011-2015)
- Suffolk Academy of Law - Advisory Committee Member (2015-Present)
- Appellate Practice Committee - Co-Chair (2011-2013, 2019-Present)
- Creditors' Rights Committee - Member, Former Co-Chair
- Leadership Development Committee - Member (2015-Present)
- Bench - Bar Committee - Member (2017-Present)

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- Nominating Committee - Member (2015-2018)
- Technology Committee - Member (2018-Present)
- Charitable Foundation - Assistant Managing Director (2013-2015)
- "Dog Day Afternoon" - Volunteer (2012-2015)
- Surrogate's Court Committee - Member
- Awarded on three occasions for providing pro-bono legal services as part of Bar Association's foreclosure settlement project

Continuing Legal Education Seminars:

- Speaker - Basics of Appellate Practice 2021
- Moderator - Avoiding The Foreclosure Tsunami 2020
- Coordinator - New Rules of the Appellate Terms 2020
- Coordinator - New Rules of the Appellate Division 2018
- Presenter - "A Mockery of a Closing" 2018
- Mentor - "Trial Practicum" 2018
- Speaker - "Hot Topics in Foreclosure Appeals" 2018
- Coordinator - "Evidence Update" 2017
- Coordinator - "Witness Identification and Wrongful Conviction" 2017
- Moderator - "Unique Challenges When Perfecting Appeals to the Appellate Term" 2017
- Coordinator & Speaker "Bankruptcy Issues for Creditors' Attorneys" 2016
- Speaker "Foreclosure Boot Camp" 2014
- Speaker "Foreclosure Appeals" 2013
- Coordinator "Basics of Appellate Practice" 2013
- Speaker "Cloud Computing" 2013
- Coordinator "E-Discovery - Talk the Talk and Avoid Disaster" 2012
- Coordinator "Criminal Appeals from the District Court" 2012
- Coordinator "Foreclosure Defense Series part 1 - Answers & Settlement Conferences" 2011
- Coordinator "Foreclosure Defense Series part 2 - HAMP" 2011
- Coordinator & Speaker "Appeals from the Surrogate's Court" 2011
- Coordinator "Practice in the Appellate Division" 2011
- Speaker "Foreclosure Law & Procedure: Soup to Nuts" 2011

Publications:

- "Timing Rules Regarding Motions for Permission to Appeal to the New York State Court of Appeals" (The Suffolk Lawyer, September 2020)
- "Hot topics in Foreclosure Appeals" (The Suffolk Lawyer, May 2020)
- "Mock Trial - A Coordinator's View" (The Suffolk Lawyer, February 2020)
- "Appellate Practice Committee Holds Moot Court" (The Suffolk Lawyer, January 2020)
- "Warning signs from the Second Department" (The Suffolk Lawyer, December 2019)
- "Using Twitter as a Leadership Tool" (The Suffolk Lawyer, September 2019)
- "Hot Topics in Foreclosure Appeals" (The Suffolk Lawyer, January 2018)
- "Standing after *Aurora v Taylor*" (The Suffolk Lawyer, June 2016)
- "Are LegalZoom and Others Like It Illegal?" (The Suffolk Lawyer, November 2015)
- Special Section Editor for Technology (The Suffolk Lawyer, February 2015)
- "Avvo.com Ratings" (The Suffolk Lawyer, February 2015)
- "Practical Tips for Oral Argument" (The Suffolk Lawyer, October 2014)

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- Special Section Editor for Technology (The Suffolk Lawyer, February 2014)
- “Adventures in 3d Printing” (The Suffolk Lawyer, February, 2014)
- “Useful Online Commercial Law Resources” (The Suffolk Lawyer, November 2013)
- “Emergency Applications To The Appellate Division, Second Department” (The Suffolk Lawyer, June 2013)
- “Veterans Need Our Help” (The Suffolk Lawyer, March 2013)
- “You Too Can Be A Power Searcher On Google” (The Suffolk Lawyer, December 2012)
- “Is Twitter for You?” (The Suffolk Lawyer, November 2012)
- “Predictive Coding - The New Frontier in Electronic Discovery” (The Suffolk Lawyer, October 2012)
- “What Google’s New Privacy Policy Really Means” (The Suffolk Lawyer, April 2012)
- “Providing Understanding at Foreclosure Settlement Conferences” (The Suffolk Lawyer, June 2010)
- “Perils of Relying on Fair Use Exception” (The Suffolk Lawyer, March 2009)
- “Why Video Game Laws Are Unconstitutional” (The Suffolk Lawyer, April 2009)
- “Anonymous Bloggers, Defamation and Pre-Action Disclosure” (The Suffolk Lawyer, June 2009)

Teaching:

- Adjunct Assistant Professor of Drama & Media Studies - Dowling College (2006-2015)
- Lectured annually at Columbia University on topic of “Entertainment & Media Law” (2011-2020)
- Lectured annually at Touro Law Center on topic of “Law Office Technology” (2012-2018)

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PAUL BUGONI, ESQ.

Born and raised in Queens, New York, Paul attended Long Island University (CW Post} and Quinnipiac Law School. Paul's initial experience was in transactional real estate and real estate litigation, primarily representing institutional lenders, especially in residential and commercial foreclosures. Paul in the course of his private practice employ has written appellate briefs and has argued matters before the Appellate Division, Second Department.

After years in private practice, Paul went in-house as counsel and joined a National Underwriter in 1998 in the claims department. Thereafter, Paul transitioned into both residential and commercial underwriting and has been an underwriter since. Paul is a frequent speaker at Continuing Legal Education classes, primarily on real estate topics, and spoke on the CFPB's TRID regulations for the New York State Bar Association. Paul is also an approved course instructor for the NYS Department of Financial Services.

Paul is currently a Senior Agency Counsel and Vice President for WFG National Title Insurance Company

Insuring title out of a partition action- some factors to be considered:

Was the Lis Pendens timely filed and served?

Was there proper service of the summons and complaint within mandated timelines?

Were all the necessary parties named and served in the action?

Were any additional parties such as lienholders, etc. named?

Was the required clerk certified search performed?

If a reference was ordered was there a publication notifying potential non-party lienors?

Did all the known non-party lienholders receive notice of the partition?

Does the judgment provide for the sale of the property (as opposed to only partition)?

Is the judgment granting the sale final and non-appealable?

Insuring title out of a partition action- some factors to be considered:

Was the Lis Pendens timely filed and served?

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Did all the known non-party lienholders receive notice of the partition?

Does the judgment provide for the sale of the property (as opposed to only partition)?

Is the judgment granting the sale final and non-appealable?

The Notice of Pendency – Governing Statutes – CPLR §6501

When was it dated?

When was it filed?

Where was it filed?

Is the plaintiff the same as the owners of record?

Does it accurately describe the premises in question?

Does it accurately describe the type of proceeding?

Was one of the defendants served no later than 30 days following the filing of the Notice of Pendency? (CPLR §6512)

Were all of the defendants served within 120 days? (CPLR §306b).

Was the Notice of Pendency extended by Court Order or new Notice of Pendency filed after 3 years? (Repeat the same analysis above for each re-filing.)

The Summons and Complaint

When was it dated?

When was it filed?

Where was it filed?

What causes of action does it contain? (partition or a sale of the property)

Do the metes and bounds description in the Complaint match the metes and bounds descriptions contained in the vesting deed and the Notice of Pendency?

How was the S & C served? In hand? SAD? Nail and Mail? Important!!!

ADDITIONAL DOCUMENTS FILED WITH THE COURT

Motion Papers-review.

When was it dated/filed?

Does it show whether anyone answered, and if so, what happened to their answer?

Are any defendants an infant, incompetent or absentee?

At this point, several parties have already reviewed the motion papers. **Our goal is to spot discrepancies**.

Merges with the Notice of Pendency

When was it dated/filed?

Was it granted on default?

If parties appeared in the proceeding, was it served with Notice of Entry? **Title insurers generally do not insure until an order or action is final and non-appealable.**

If the property cannot be partitioned, does it direct the sale by a Referee?

Do the metes and bounds described in the order match the vesting deed (if sale is directed), the Notice of Pendency and in the Complaint?

Does it bar all defendants from making claims against the subject premises?

To what conditions is the sale made subject?

Sold in one parcel or separate parcels?

Notice of Sale

When was the Notice of Sale dated/filed?

Was it served on all attorneys/parties?

Do the metes and bounds description match the vesting deed, Notice of Pendency, Summons and Complaint and Judgment?

Proof of Publication Governed by RPAPL §231.

When was it dated/filed?

If the publication was for three weeks, did the sale occur between the 21st day and on or before the 28th day after the first publication?

If the publication was for four weeks, did the sale occur after the 28th day but before the 35th day after the 1st publication?

The Notice of Pendency – Governing Statute – CPLR §6501

When was it dated?

When was it filed?

Where was it filed?

Are all of the parties the same as those set forth in the Summons and Complaint?

Does it accurately describe the premises in question?

Does it accurately describe the type of proceeding?

Was one of the owners served no later than 30 days following the filing of the Notice of Pendency? (CPLR §6512)

Were all of the defendants served within 120 days? (CPLR §306b).

Was the Notice of Pendency extended by Court Order or new Notice of Pendency filed after 3 years? (Repeat the same analysis above for each re-filing.)

The Summons and Complaint

When was it dated?

When was it filed?

Where was it filed?

What causes of action does it contain? Does it ask for partition of the property or for the public auction of the property?

Necessary Defendants-

903. Necessary defendants. Each of the following persons shall be made a party to the action:

1. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy or for

years;

2. Every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate

therein;

3. Every person who, by any contingency, is or may become entitled to a beneficial interest in an undivided share in the property, provided

that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a

future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such

event had happened immediately before the commencement of the action;

4. Every person having an inchoate right of dower in an undivided share in the property;

5. Every person having a right of dower in the property, or any part thereof, which has not been admeasured; and

6. An executor or administrator, where letters testamentary or of administration have been issued on the estate of the decedent from whom

the plaintiff's title to the real property is derived, and the action is brought within eighteen months after such letters were issued; or where

the person of whose estate the executor or administrator has been appointed should, if living, be a party to the action. If no executor or

administrator has been appointed for the estate of such a person, that fact must be stated in the complaint.

Permissive Defendants

904. Permissible defendants. The plaintiff, at his election, may make defendant in the action:

1. A tenant by the curtesy or for life or for years, of the entire property, or whoever may be entitled to a contingent or vested remainder

or reversion in the entire property, or a person having a lien or interest which attaches to the entire property. A person specified in

this subdivision who is not made a party is not affected by the judgment in the action.

2. A person having a lien on an undivided share or interest in the property. The nature of the lien and the share or interest to which it

attaches shall be specified.

3. An unknown person entitled to an estate or interest in the property sold. The court shall provide for the protection of his rights, as far

as may be, as if he were known and had appeared.

4. The state.

The complaint shall describe the property with reasonable certainty, specify the rights, shares and interests therein of each

of the parties, as far as the same are known to the plaintiff, and contain any other allegation required by statute. If a party, or the

share, right or interest of a party, be unknown to the plaintiff; or if a share, right or interest be uncertain or contingent; or if the

ownership of the inheritance depend upon an executory devise; or if a remainder be contingent, so that the party cannot be named; such facts

shall be stated in the complaint. The complaint shall state whether the parties own any other lands in common. See RPAPL 905

§ 913. Inquiry as to creditors.

1. Before an interlocutory judgment for the sale of real property is rendered the court shall ascertain, by

reference or otherwise, whether there is any creditor not a party who has a lien on the undivided share or interest of any party. A search

certified by the clerk or by the clerk and register of the county where the property is situated that there is no such outstanding lien is

sufficient proof of the absence of such creditor.

2. Where a reference is directed, the referee shall cause a notice to be published once in each week for four successive weeks in such

newspaper published in the county wherein the place of trial is designated as shall be designated by the court directing said reference,

and also, where the court so directs, in a newspaper published in each county wherein the property is situated, requiring each person not a

party to the action who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the

referee at a specified place and on or before a specified day to prove his lien and the true amount due or to become due to him by reason

thereof. The referee shall report to the court with all convenient speed the name of each creditor whose lien is satisfactorily proved before

him, the nature and extent of the lien, the date thereof and the amount due or to become due thereupon.

§ 915. Interlocutory judgment.

The interlocutory judgment shall determine the right, share or interest of each party in the property, as

far as the same has been ascertained. Where the property or any part thereof is so circumstanced that a partition thereof cannot be made

without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, shall direct

that the property or the part so circumstanced be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff

shall direct that partition be made between the parties according to their respective rights, shares and interests and shall designate three

reputable and disinterested freeholders as commissioners to make the partition so directed.

§ 916. Interlocutory judgment directing partial partition.

Where the right, share and interest of a party has been ascertained, and the rights, shares or interests of the other

parties as between themselves remain unascertained, an interlocutory judgment for a partition shall

direct a partition as between the party whose share has been so determined and the other parties to the action. Where the rights, shares

and interests of two or more parties have been thus ascertained and determined, the interlocutory judgment may also direct the partition

among them of a part of the property proportionate to their aggregate shares. In either case, the court, from time to time, as the other

rights, shares and interests are ascertained, may render an interlocutory judgment directing the partition, in like manner, of the

remainder of the property. Where an interlocutory judgment is rendered in a case specified in this section, the court may direct the action to

be severed, and final judgment to be rendered with respect to the portion of the property set apart to the parties whose rights, shares

and interests are determined, leaving the action to proceed as against the other parties with respect to the remainder of the property; and if

necessary, the court may direct that one of those parties be substituted as plaintiff.

§ 917. Interlocutory judgment directing partition in common.

Where two or more parties desire to enjoy their shares in common with each other, the interlocutory judgment may direct

partition to be so made as to set off to them their shares of the real property partitioned, without partition as between themselves,

to be held by them in common.

§ 918. Interlocutory judgment directing sale or exception of lien or dower interest.

1. An interlocutory judgment directing the sale of the property may direct that the premises sold shall be free from the lien

of every debt of a decedent, from whom the plaintiff's title is derived, or of a decedent who, if living, should be a party to the action, except

debts which were a lien upon the premises before the death of such decedent.

2. Where a party has an existing right of dower in the entire property directed to be sold, at the time when an interlocutory judgment for a

sale is rendered in an action for partition, the court shall determine whether the interests of all the parties require that the right of dower

should be excepted from the sale or that it should be sold. If a sale of the property, including the right of dower, is directed, the interest of

the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and

discharged from any claim by virtue of that right.

Actual partition

921. Actual partition.

1. The commissioners designated by the interlocutory judgment shall forthwith proceed to make partition as

directed by such judgment, unless it appears to them that partition thereof, or of a particular lot, tract or other portion thereof, cannot

be made without great prejudice to the owners; in which case, they shall make a written report of that fact to the court.

2. The commissioners shall divide the property into distinct parcels and allot the several parcels to the respective parties, quality and

quantity being relatively considered, according to the respective rights and interest of the parties as fixed by the interlocutory judgment.

They shall designate the several parcels by suitable monuments. They may employ a surveyor, with the necessary assistants, to aid them.

3. Where a party has a right of dower in the property, or a part thereof, which has not been admeasured, or has an estate by the curtesy

or for life or for years in an undivided share of the property, the commissioners may allot to that party his share without reference to the

duration of the estate. They may make partition of the share so allotted to that party, among the parties who are entitled to the remainder or

reversion thereof, to be enjoyed by them upon the determination of the particular estate, where, in the opinion of the commissioners, such a

partition can be made without prejudice to the rights of the parties.

922. Meeting of commissioners; report of actual partition; confirming or setting aside report.

1. All the commissioners shall meet together in the performance of any of their duties, but the acts of a majority so met are valid.

They shall make a full report of their proceedings, under their hands, specifying therein the manner in which they have

discharged their trust, describing the property divided and the share or interest in a share allotted to each party, with the

quantity, courses and distances or other particular description of each share, and a description of the monuments; and specifying the items of

their charges. Their report shall be acknowledged or proved, and certified, in like manner as a deed to be recorded, and shall be filed

in the office of the clerk.

2. The court shall confirm or set aside the report, and, if necessary, may appoint new commissioners.

3. If the commissioners report that the property, or a particular lot, tract or other portion thereof is so circumstanced that a partition

thereof cannot be made without great prejudice to the owners, the court may render a supplemental interlocutory judgment reciting the facts and

directing that the property or the distinct parcel so circumstanced be sold.

Notice of Sale

When was the Notice of Sale dated/filed?

Was it served on all attorneys/parties?

Do the metes and bounds description match the vesting deed, Notice of Pendency, Summons and Complaint and Judgment?

Proof of Publication Governed by RPAPL §231.

When was it dated/filed?

If the publication was for three weeks, did the sale occur between the 21st day and on or before the 28th day after the first publication?

If the publication was for four weeks, did the sale occur after the 28th day but before the 35th day after the 1st publication?

§ 925. Report of sale; confirmation.

1. Immediately after completing the sale, the officer making it shall file with the clerk his report thereof under oath,

containing a description of each parcel sold, the name of the purchaser and the price.

2. The court shall confirm or set aside the report.

IMPORTANT TO REVIEW THE REPORT OF SALE

§ 927. Contents of judgment after actual partition.

Upon the confirmation by the court of the report of the commissioners making partition, final judgment shall be entered

directing that each of the parties who is entitled to possession of a distinct parcel allotted to him, be let into the possession

thereof, either immediately, or after the determination of the particular estate, as the case requires.

§ 928. Effect of judgment after actual partition.

A final judgment after actual partition is binding and conclusive upon the following persons, except parties and persons

claiming under them whose rights and interests are expressly left unaffected:

1. The plaintiff; each defendant upon whom the summons was served, either personally or without the state or by publication; and his legal

representatives.

2. Each person claiming from, through or under such a party, by title accruing after the filing of the judgment-roll, or after the filing in

the proper county clerk's office of a notice of the pendency of the action.

3. Each person not in being when the interlocutory judgment is rendered who, by the happening of any contingency becomes afterwards

entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or

other virtual representative whereof, was a party specified in the first subdivision of this section.

§ 931. Contents of judgment after sale.

A final judgment confirming a sale shall direct the officer making it to execute the proper conveyances and take the proper securities

pursuant to the sale, and also direct application of the proceeds.

§ 933. Effect of judgment after sale.

A final judgment after sale is binding and conclusive upon the same persons upon whom a final judgment for actual partition

is binding and conclusive; and it bars each of those persons who is not a purchaser at the sale from all right, title

and interest in the property sold. It is also a bar against each person not a party who, at the time when it is entered, has a general lien by

judgment or decree on the undivided share or interest of a party, if notice was given to appear before the referee and make proof of liens,

as prescribed in this article, and also against each person made a party who then has a specific lien on any such undivided share or interest;

but a person having any such specific lien appearing of record at the time of the filing of the notice of the pendency of the action, who is

not made a party, is not affected by such judgment.

From a title insurance perspective, we are more concerned about the possibility of the action being set aside by one of the parties for a

myriad of reasons, particularly one involving improper service. Not every partition action will require title insurance immediately.

In one in which there is a true partition, meaning the property is broken down into parcels, title insurance is not an immediate concern.

However, when it involves a sale via public auction the ultimate purchaser will want insurance and that is where the "quality control check-up" that

title insurers perform when reviewing files coming out of litigation is performed; we are more particularly concerned with creditors, open mortgages, etc.

If it is a case where the property cannot be divided and is being auctioned as one parcel, I would be sure to raise a requirement that the property

be vacant or the policy will except "all rights of prior owner in possession", which would be in addition to the general parties in possession exception.

If it is the unusual case where the property is being divided between/among the tenants, I would be concerned about the subdivision of the

property as it relates to our ability to record the documents.