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SIGNATURE SERIES: RPAPL 993 & PRESERVING FAMILY REAL ESTATE

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Albert V. Messina, Jr., Esq. – Novick & Associates

Albert was born in New York City and raised in Great Neck, New York. He attended St. John's University where he earned a Bachelor of Arts degree in English. After graduation from St. John's he worked as a financial services representative in the insurance industry focusing on estate planning, long term care, executive bonus and business plans.

Recognizing the natural connection between financial services and the law, Albert decided to pursue a legal education. While attending law school, he interned with Donald Novick, Esq. It was through this internship that Al's interest and foundation in the areas of wills, trusts and estates was further developed. During law school, Albert was an Editor of the Touro Law Review. His academic excellence resulted in his designation as a Research Assistant for Professor Rodger D. Citron. He was further honored by being appointed a Teaching Assistant for courses in Contracts, Torts and Civil Procedure. Albert was a Pro Bono Volunteer for the Nassau Suffolk Law Services Committee where he offered assistance to those who could not afford legal representation. In 2007, he earned his Juris Doctorate from Touro Law School, graduating magna cum laude.

Throughout law school, Albert's academic achievements were acknowledged by various awards and recognitions. He was awarded the CALI Award of Excellence for the highest grade attainable in Selected Topics in Criminal Justice and was placed on the Dean's List several times. Albert also received an award for Exemplary Contributions to the Quality of Student Life at Touro Law.

Albert is an Adjunct Professor at Touro Law School, focusing on helping students prepare for the Uniform Bar Examination.

Albert is admitted to the bar in the state of New York, the United States District Courts for the Eastern and Southern Districts and the United States Court of Appeals for the Second Circuit.

Albert presently concentrates his legal practice in the areas of Trust and Estate Litigation, Probate, Administration and Accounting Proceedings, Appellate Litigation, Real Estate litigation and Estate Planning.

RPAPL §993 and Preserving Family Real Property

Suffolk County Bar Association
Surrogate's Court Committee

November 9, 2022

RPAPL § 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;

(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 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.

(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.

History

L 2019, ch 596, § 1, effective December 6, 2019.

Surrogate's Court Considerations:

I. Vesting of Real Property at Death

A. "It is well settled that title to real property vests in the decedent's distributee(s) as tenants in common at the time of decedent's death." Matter of Rosenblatt, 2019 N.Y. Slip Op 51942(U) (Sur. Ct. Queens County 2019). Title to real property vests in the specific legatees named in an instrument notwithstanding the failure to probate the dispositive instrument. Matter of Raccioppi, NYLJ Apr. 24, 2013 p.30 (col. 3) (Sur. Ct. Kings County 2013) *aff'd* 128 A.D.2d 838 (2d Dep't 2015). However, where title is challenged, title may be established "upon production and proof then being made of its validity as the devisor's will." Id. (quoting Corly v. McElmeel, 149 N.Y. 228 (1896)).

B. The Fiduciary's Power of Sale: EPTL §11-1.1 and SCPA §1902: Unless real property is specifically devised to an executor, the executor does not take title to real property but the executor may have the power to sell it under certain circumstances. Matter of Tucker, 75 Misc.2d 318 (Sur. Ct. N.Y. County 1973).

1) EPTL §11-1.1(b)(5): "With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of: (A) To take possession of, collect the rents from and manage the same. (B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein. In Matter of Freund, 162 Misc.2d 965 (Sur. Ct. Schoharie County 1994) the Court noted: "[s]ince an executor clearly has broad authority and power pursuant to EPTL 11-1.1 (b) (5) to sell real property, Surrogates have increasingly taken the position that proceedings under SCPA article 19 should *not* generally be entertained and/or should be denied in the absence of extraordinary circumstances." "Furthermore, although title to the real property of an intestate decedent vests upon death in the statutory distributees by operation of law, the vesting is subject to the power of the administrator to sell the property to pay debts and/or administration expenses and make distribution." DeLuca v. Samuels, 2018 NY Slip Op 32262(U) (Sur. Ct. Nassau County 2018).

2) SCPA §1902: "The real property may be disposed of for any or all of the following purposes: (1) For the payment of the expenses of administration. (2) For the payment of funeral expenses. (3) For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death. (4) For the payment of any transfer, estate or other death tax. (5) For the payment of any debt or legacy charged thereupon. (6) For the payment and distribution of their respective shares to the persons entitled thereto. (7) For any other purpose the court deems necessary." While it is true that title to an estate's real

property vests in beneficiaries at the moment of a testator's death, their title is qualified and subject to the executor's power to sell the property to satisfy the debts and obligations of the estate." 72634552 Corp. v. Okon, 2018 NY Slip Op 51991(U) (Sur. Ct. Kings. County 2018).

2) Executor's Commissions: "It is well established that when real property vests pursuant to the terms of a will and the executorial power of sale expires, the executors are not entitled to commissions." Matter of Driver, 77 Misc.2d 664 (Sur. Ct. N.Y. County 1974). However, where the fiduciary must take executorial action, such as allocating the property among the beneficiaries (see Matter of Driver, *supra*) or invoking their power of sale pursuant to EPTL §11-1.1(b) or SCPA §1902, commissions may be awarded for receiving and distributing the property.

II. Ejectment Proceedings

A. An "ejectment as an action at law to restore possession of real property to the party rightfully entitled to it. Where a party having a right of possession in real property is excluded from it, an action to recover real property enables enforcement of a right of entry against the defendant who is wrongfully denying possession. This court has jurisdiction over such matters where it involves the affairs of the decedent and the ejectment or eviction is part of the process of administering the estate." Estate of Taylor, 2005 N.Y. Misc. LEXIS 3263 (Sur. Ct. Kings County 2005).

B. In Matter of Gunst, NYLJ Apr. 10, 2012 p.31 (col. 3) (Sur. Ct. Suffolk County), the decedent died testate survived by two sons. The residuary estate, including real property, was devised to the two sons. One son received letters testamentary. The Court heard a successor executor's accounting proceeding that, *inter alia*, involved allocating rents and legal fees utilized to revoke letters previously issued to the prior executor, eject the prior executor from the estate's real property, charge the prior executor with rents for the exclusive use and occupancy of the property. The Court charged the former executor's share with rents because while he was a fiduciary, "it was his duty to collect rents on behalf of the estate, which he failed to do in favor of his remaining in the home" and charged rents for the period after his letters testamentary were revoked to the date he was ejected. The Court also allocated a portion of legal fees against the former executor's share pursuant to Matter of Hyde, 15 N.Y.3d 179 (2010).

Additional Considerations (assuming *arguendo* two tenants in common):

III. Accountings in Partition Actions

A. Prior to the entry of an interlocutory judgment directing the sale of a property, a court is obligated to ensure that there is an accurate accounting. Where a sale is demanded rather than actual physical partition, a determination must be made as

to the rights, shares or interests of the parties and whether any part of the subject property is "so circumstances that a partition thereof cannot be made without great prejudice to the owners. Such determinations must be included in the interlocutory judgment contemplated by RPAPL §915 along with either a direction to sell at public auction or a direction to physically partition the premises." Morais v. Malguarnera, 2015 N.Y. Slip. Op.31831(U) (Sup. Ct. Suffolk County 2015). See also Donlon v. Diamico, 33 A.D.3d 841 (2d Dep't 2006). In addition, a pre-sale accounting is necessary where findings regarding the income and expenses of the premises and equitable adjustments to the shares or interests in the premises are demanded and not determinable as a matter of law. Ianucci v. Fiorentino, 2015 N.Y. Slip Op.32722(U) (Sup. Ct. Suffolk County 2015).

1). No accounting is necessary where none is demanded, nor where any claims for adjustment of rents, profits or share of interest is made. Zabris v. Triades, 2015 N.Y. Slip Op.50283(U) (Sup. Ct. Suffolk County 2015).

2) Generally, parties are entitled to a credit for one-half the payments made for maintenance, upkeep and repair of the premises including mortgage and insurance payments as well as rents received. McIntosh v. McIntosh, 58 A.D.3d 814 (2d Dep't 2009).

3) Merely making improvements or repairs does not automatically entitle a party to an equitable allowance for a credit, there must be evidence that the circumstances required improvements or repairs. Worthing v. Cossar, 93. A.D.2d 515 (4th Dep't 1983).

4) A party may only recover payments that the party personally made on the property in excess of their obligations and lack standing to seek recovery for expenditures made by a non-party to the action. Agudosi v. Berlin, 2013 N.Y. Slip Op.31383(U) (Sup. Ct. Suffolk County 2013).

B. Ouster

1) Mere occupancy by one cotenant does not make that tenant liable to the other for use and occupancy absent ouster or an agreement to that effect. Misk. v. Moss, 41 A.D.3d 672 (2d Dep't 2007).

2) Actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or deny the rights of cotenants. Ouster may be implied 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. Fini v. Marini, 164 A.D.3d 1218 (2018).

3) Mere recording of a deed is insufficient to establish ouster. Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC, 78 A.D.3d 746 (2d Dep't 2010).

4) Ouster is not established where a party voluntarily relocates from a property without any further allegations that the same party attempted to access or use any part of the property and was prevented from doing so. Perretta v. Perretta, 2014 N.Y. Slip Op.50904(U) (Sup. Ct. Kings County 2014). Personal disputes, arguments, name calling or perceived slights from the defendant do not constitute ouster absent testimony that it was unsafe or improper for the plaintiff to continue to reside in the property or that the plaintiff was forced to leave. Saltalamacchia v. Miceli, 2013 N.Y. Slip Op.31688(U) (Sup. Ct. Suffolk County 2013).

5) In Gendler v. Guendler, 174 A.D.3d 507 (2d Dep't 2019), the Court found an implied ouster: The plaintiff testified that the locks to the house and garage were changed and that a lock had been placed on the mailbox in January or February 2013. The plaintiff further testified that the defendant would not allow her access to the home. When she reported the situation to law enforcement, she was told that she would need to get a court order to access the home. The defendant admitted that his son changed the locks to the home and garage, but denied ever telling the plaintiff that she could not have access to the home. However, the defendant's attorney conceded that there was no dispute that the plaintiff did not have access to the home since January 2013."

6) A party was not ousted by the entry of orders of protection that did not result in findings or admissions of wrongdoing since it was the Family Court that prevented access to the property during that period in time. Messina v. Mayer, NYLJ May 13, 2015 p.31 (Sup. Ct. Suffolk County 2015). A party that was incarcerated was not ousted based upon "his own irresponsible behavior" entitling the party in possession to reimbursement for expenditures despite exclusively occupying the premises. Doyle v. Hamm, 52 A.D.2d 899 (2d Dep't 1976).

IV. Partition is Subject to the Equities Between the Parties

A. While partition is a statutory right, it is not absolute and is subject to equitable considerations. In Bonanno v. Flanagan, 2014 N.Y. Slip Op.32937(U) (Sup. Ct. Suffolk County 2014), a 12+ acre parcel could not be physically partitioned among four owners as the local zoning provisions permitted a subdivision into only two lots and a further, final subdivision would remain subject to the local town planning and zoning boards. The Court held that "[g]iven the time, expense and uncertainty of outcome surrounding this proposal, the evidence of great prejudice to the owners is clear and therefore the appointment of a referee to sell the premises as one lot at public auction is required pursuant to RPAPL 915."

B. In Ng v. Ng, 2021 N.Y. Slip Op.31289(U) (Sup. Ct. Kings County 2021) the defendant failed to establish that partition would result in great prejudice to the owners because the unsworn, uncertified construction invoice upon which the defendant relied "which ostensibly provides an estimate of the cost of physically partitioning the premises to permit the plaintiffs access to the common areas, is insufficient to support a showing that partitioning is possible or even plausible."

Matter of Rosenblatt (Solomon)

Surrogate's Court of New York, Queens County

December 5, 2019, Decided

2013-3550/C

Reporter
2019 N.Y. Misc. LEXIS 6458 *; 2019 NY Slip Op 51942(U) **; 65 Misc. 3d 1232(A); 119 N.Y.S.3d 828; 2019 WL 6711563

[**1] In the Matter of the Application of Louis M. Rosenblatt, Public Administrator of Queens County as Temporary Administrator of the Estate of Agatha Solomon, Deceased, to Vacate Deeds and Restore Legal Title.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Counsel: [*1] For Petitioner: Gerard J. Sweeney, Esq., Counsel to the Public Administrator of Queens County, Lake Success, New York.

For Respondent: James P. Truitt III, Thomas G. Sherwood, LLC, Garden City, New York.

Judges: Peter J. Kelly, S.

Opinion by: Peter J. Kelly

Opinion

Peter J. Kelly, S.

Based upon an increasingly frequent and distressing set of facts in Queens, the Public Administrator, as temporary administrator of the estate of Agatha Solomon, has again been compelled to commence a proceeding seeking to vacate two deeds and mortgages. The deeds, consecutively executed on January 24, 2014, allegedly represent conveyances of real property located on Gillmore Street in East Elmhurst, Queens (Elmhurst property), while the two mortgages were made by the grantee of the second deed, D & A Property Mgt. & Development L.L.C. (D & A Development).

The court previously granted that part of the petition seeking to vacate the deeds by order dated April 24, 2018. Now, the respondent mortgagee Gillmore Street Funding Associates (Funding Associates) moves to summarily dismiss that part of the petition requesting the vacature of the mortgages (CPLR 3212) upon the ground that it is a bona fide encumbrancer for value (Real Property Law § 266). It further seeks a declaration [*2] that the mortgages are first priority liens against the Elmhurst property, and that petitioner pay all sums due on the mortgages [**2] from the net proceeds collected from its sale at public auction. Alternatively, in the event the mortgages are set aside, Funding Associates seeks a declaration that it is equitably subrogated to a tax lien discharged by money received from the first mortgage.

The decedent died intestate on September 28, 2000 as sole owner of an unencumbered income producing two-family residence in Elmhurst. Thirteen years later, on August 23, 2013, decedent's nephew George filed a petition for letters of administration alleging he was the decedent's sole surviving distributee. His affidavit in support stated that letters were necessary to pay off decedent's debts, late fees due on the estate tax return, and an

amount owed in a tax lien foreclosure proceeding. Allegedly, it was his intent to pay off the liens by mortgaging the premises upon transferring the property to himself "as the nearest statutory distributee."

However, George thereafter filed an affidavit renouncing his appointment in favor of a designee, Shaun, who was granted letters of administration on December 6, [*3] 2013. Shaun utilized the letters to execute a no-consideration deed transferring the Elmhurst property from the decedent's estate to George on January 24, 2014. Then, that same day, George in turn executed a no-consideration deed transferring the property to respondent D & A Development, a company that Shaun owned. This plan to convey two deeds in sequence was carried out pursuant to a written letter agreement (Letter Agreement), also executed by Shaun and George that same day, which provided that George would transfer title to Shaun, his "second cousin," because the property was subject to a tax lien foreclosure and George was advised that the property "can only be mortgaged by [Shaun's] company and there is no other way to pay the open tax lien." Shaun in turn promised that "D & A Development will apply to the Surrogate's Court for permission to distribute most of the loan proceeds for the purpose of renovating the premises and maintaining [George]." Finally, the agreement required that George decline representation by an attorney at the closing of the Elmhurst property.

Three days later and on January 27, 2014, D & A Development obtained a mortgage in the amount of $ 200,000.00 from [*4] the respondent mortgagee, D. Perla Associates L.P. ("Perla mortgage") which was recorded on March 28, 2014. Thereafter, on December 28, 2015, D & A Development obtained a second mortgage in the amount of $ 200,000.00 from the respondent Funding Associates which was recorded on February 26, 2016. A Consolidation, Modification and Extension Agreement ("C.M.E. Agreement") was signed contemporaneously therewith by Shaun as managing member of D & A Development, consolidating the two mortgages into a single lien ("Consolidated Mortgage") against the Elmhurst property in favor of Funding Associates in the principal amount of $ 400,000.00.

As could be anticipated, D & A Development defaulted on the Consolidated Mortgage, prompting Funding Associates to commence a foreclosure action in July, 2017. Upon learning of the foreclosure proceeding, George filed a petition to revoke Shaun's letters of administration and have himself appointed as administrator. George now alleged that Shaun had "obtained the letters by false suggestion of material fact . . . in an attempt to defraud the Estate and its beneficiaries without the approval of the Court." Specifically, George averred that when he executed [*5] the documents for the administration proceeding he had been told by Shaun's attorney, Spivak, that he did not need to read them and was given verbal assurances that the transfer of the property to Shaun's company would be temporary. As a result, false documents were filed with the court stating that he was a sole distributee.

George admitted that this allegation was a "complete lie" because he had three sisters who were beneficiaries.[1] Further, he claimed the statement in the affidavit renouncing his appointment in favor of his "second cousin" Shaun, whom was in better financial standing, "was totally false." Notably, Shaun was neither his "second cousin" nor a distributee. Finally, the provision in the Letter Agreement that an application would be made to the surrogate's court to distribute the mortgage proceeds was also false because no such application was ever made or, in fact, exists.

Upon Shaun's default in the revocation proceeding, the court revoked letters on January 18, 2018, denied that part of the application to appoint George as successor and, instead, appointed the Public Administrator of Queens County as the temporary administrator of decedent's estate (SCPA

[1] George's admission to the existence of other distributees was undisputed and it rebutted other false information provided in the affidavit of heirship by a "friend" in the administration proceeding.

901). The Public Administrator [*6] filed this petition forthwith seeking to vacate the two deeds dated January 24, 2014, the Perla mortgage dated January 27, 2014 and the Funding Associates mortgage dated December 28, 2015. The petition alleges that both Shaun and George entered into a fraudulent scheme to defraud decedent's distributees out of their vested interests in the Elmhurst property by obtaining letters of administration under the false pretense that George was the sole distributee of decedent's estate and then utilizing the letters to convey the property in a series of transactions to D & A Development. It is alleged that, since false pretenses were utilized to convey the Elmhurst property, the deeds were void ab initio and the mortgages thereon are likewise invalid.

Shaun and D & A Development filed a notice of appearance in this proceeding but they, along with George, defaulted in filing an answer. Following their default and the court's vacature of the two deeds, the Public Administrator and Funding Associates entered into an agreement on October 24, 2018 (Standstill Agreement), allowing for the sale of the Elmhurst property and the release of the Consolidated Mortgage lien, and providing for the deposit [*7] of the net proceeds in the estate account pending final adjudication of Funding Associates' claim to the net proceeds to the extent needed to satisfy D & A Development's mortgage indebtedness.

Eventually, on October 25, 2018, the Elmhurst property was sold by petitioner and the net proceeds have been deposited into the estate account. Deducted from the proceeds were payments for decedent's Federal and New York State estimated income taxes as well as a portion of the outstanding administration expenses of the Public Administrator.

As the party moving for summary judgment, respondent is required to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact *(see Ayotte v Gervasio*, 81 NY2d 1062, 1063, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Vumbico v Estate of Rose H. Wiltse*, 156 AD3d 939, 940, 68 N.Y.S.3d 140 [2d Dept 2017]). Once this showing has been made, the burden then shifts to the petitioner who must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see Hoover v New Holland, Inc.*, 23 NY3d 41, 56, 988 N.Y.S.2d 543, 11 N.E.3d 693 [2014]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Re-Max Classic Realty, Inc. v Berger*, 25 AD3d 680, 681 [2d Dept 2006]).

Funding Associates alleges it is entitled to summary judgment dismissing the petition based upon its affirmative defense that it is a bona fide encumbrancer for value (*see* Real Property Law § 266).

A bona fide purchaser or encumbrancer for value is protected in [*8] its title unless the deed is void and conveys no title (*Marden v Dorthy*, 160 NY 39, 54 N.E. 726 [1899]; *see Faison v Lewis*, 25 NY3d 220, 224-226, 10 N.Y.S.3d 185, 32 N.E.3d 400 [2015]; *ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801, 939 N.Y.S.2d 70 [2d Dept 2012]; *Solar Line, Universal Great Bhd., Inc v Prado*, 100 AD3d 862, 955 N.Y.S.2d 96 [2d Dept 2012]), or it had previous notice of fraudulent intent by the grantor or fraud rendering void the title of the grantor (Real Property Law § 266*; see Feggins v Marks*, 171 AD3d 1014, 99 N.Y.S.3d 45 [2d Dept 2019]; *Matter of Raccioppi*, 128 AD3d 838, 839, 10 N.Y.S.3d 131 [2d Dept 2015]; *LaSalle Bank National Assoc. v Ally*, 39 AD3d 597, 599-600, 835 N.Y.S.2d 264 [2d Dept 2007]; *Karan v Hoskins*, 22 AD3d 638, 803 N.Y.S.2d 666 [2d Dept 2005]), or if it had knowledge of facts that would "excite the suspicion of an ordinarily prudent person" and it fails to make a reasonable inquiry thereof (*Booth v Ameriquest Mtge. Co.*, 63 AD3d 769, 881 N.Y.S.2d 152 [2d Dept 2009], quoting *Anderson v Blood*, 152

NY 285, 293, 46 N.E. 493 [1897]; *see Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 A.D.3d 744, 746, 48 N.Y.S.3d 438 [2d Dept 2017]; *Mortgage Elec. Registration Sys., Inc. v Rambaran*, 97 AD3d 802, 804, 949 N.Y.S.2d 694 [2d Dept 2012]).

Funding Associates' argument that it is a bona fide encumbrancer for value hinges, in the first instance, on the question whether the deeds executed on January 24, 2014 and subsequently vacated by this court were void ab initio or merely voidable. If a deed is void ab initio, then neither the grantee nor any subsequent grantee can acquire good title (*see LaSalle Bank Nat. Assn. v Ally*, 39 AD3d at 600) and the mortgages that are based upon those deeds are likewise invalid (*see Cruz v Cruz*, 37 AD3d 754, 832 N.Y.S.2d 217 [2d Dept 2007]; *see also First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 742, 904 N.Y.S.2d 707 [2d Dept 2010]; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 522, 867 N.Y.S.2d 204 [2d Dept 2008]). If, on the other hand, the deed is voidable, it validly transfers the grantor's interest until such time it is set aside (*see Marden v Dorthy*, 160 NY at 50).

In support of the motion, Funding Associates submits copies of the pleadings and papers in this proceeding and the prior proceedings for letters of administration and revocation of Shaun's letters as well as the documentary evidence exchanged in the course of [*9] discovery including, but not limited to, copies of the two deeds, the Perla mortgage, the Funding Associates mortgage, the C.M.E. Agreement and a copy of the papers in the mortgage foreclosure proceeding it brought against Shaun and D & A Development. It also supplies an affidavit of its partner D.J. Houlihan Jr., a copy of a title report for the Elmhurst property dated 2015, copies of leases for the first and second floor rentals at the Elmhurst property, a copy of a tax lien certificate pertaining to the Elmhurst property, a certificate of tax lien discharge and a copy of the Standstill Agreement. Examinations before trial of the respondents apparently were not conducted as no transcripts have been provided.

The documentary evidence submitted by Funding Associates shows that the decedent's estate was targeted in a tax lien foreclosure rescue scheme whereby Shaun, a stranger to the estate, obtained letters of administration as a designee under the false pretense that George was decedent's sole distributee. Notwithstanding George's allegation that he was advised not to read the pleadings and papers, he is presumed to have known the contents of the documents he executed and also to have [*10] assented to them (*see e.g. Prompt Mtge. Providers of N. America LLC v Zarour*, 155 AD3d 912, 914, 64 N.Y.S.3d 106 [2d Dept 2017]; *Ng v. Wei Ji*, 41 Misc. 3d 130[A], 981 N.Y.S.2d 639, 2013 NY Slip Op 51740[U] [Sup Ct, App Term 2013] [**3]). Had he been forthright, other interested parties would have been noticed (SCPA 1003) and Shaun would have been ineligible to serve as administrator without the consent of all distributees who had equal priority with George (SCPA 1001 [1], [6]).

The undisputed evidence also proves that Shaun utilized the letters of administration to convey an apparent one-hundred percent (100%) fee simple ownership in title to the Elmhurst property to George by the administrator's deed and then, on that same day and pursuant to the Letter Agreement, George conveyed the same title and purported interest to Shaun's company, D & A Development. The logistics and effect of this scheme was to cheat the other distributees out of their vested title in the Elmhurst property and to cause them to be stripped of their equity once the Perla mortgage and Funding Associates mortgage were given and combined into the Consolidated Mortgage.

"A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid" (*Cruz* at 754; *see Matter of Bowser*, 167 AD3d 1001, 1002, 88 N.Y.S.3d 901 [2d Dept 2018]; *Ortiz v Silver Invs.*, 165 AD3d 1156, 1157, 87 N.Y.S.3d 50 [2d Dept 2018]). "If a document purportedly conveying a property interest is void, it conveys nothing, and a

subsequent bona [*11] fide purchaser or bona fide encumbrancer for value receives nothing" (*ABN AMRO Mtge. Group Inc. v Stephens*, 91 AD3d at 803; *Solar Line, Universal Bhd. Inc.*, 100 AD3d at 863).

In similar cases where deeds were executed under the false pretense that the grantor was the sole distributee of the decedent, the deeds have been found to be void ab initio (*see e.g. Cruz v Cruz*, 37 AD3d 754, 832 N.Y.S.2d 217; *see also First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 904 N.Y.S.2d 707; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 867 N.Y.S.2d 204).

Funding Associates argues that the difference here is that the grantor, Shaun, was not the sole distributee but, rather, the administrator of decedent's estate clothed with power and authority under EPTL Article 11 to sell the Elmhurst property. In support of this argument, Funding Associates argues that the cases of *Mu-Min v Lee* (2010 NY Misc LEXIS 3053, 2010 NY Slip Op. 31738[U], 2010 WL 28002029 [Sup Ct, Queens County]) and *Estate of Paccione* (NYLJ, May 17, 2019 at 43, 2019 NYLJ LEXIS 1693 [Sur Ct, Queens County]) are directly on point.

Contrary to Funding Associates' argument, the facts and legal holding in *Estate of Paccione* are not remotely similar. In that case, this Court granted the motion by the objectant-mortgagee for summary judgment dismissing the petition on the basis that petitioner failed to provide adequate evidence regarding its forgery allegation which would serve to overcome the mortgagee's prima facie showing of entitlement to summary judgment. In this matter, actual fraud has been clearly established.

In the Supreme Court case of *Mu-Min [*12] v Lee*, the plaintiff-administrator sought to invalidate a deed she executed alleging that two individuals fraudulently induced her into conveying the deed as part of a mortgage rescue scheme whereby the mortgage would be satisfied in exchange for the temporary transfer of title in the real estate to them. The Supreme Court found the plaintiff-administrator was estopped from claiming a lack of authority to execute the deed and it was valid solely to the extent of conveying her individual ownership interest in the real property.

The facts of *Mu-Min v Lee* differ from this case, however, in that the fiduciary in that matter had properly obtained letters. In this case, letters of administration were first obtained by a stranger to the estate, Shaun, under the fraudulent pretense that he was the designee of the sole [**4] heir of decedent's estate. The facts herein further differ since the letters were utilized to initiate a two-step sequence of deed transfers whereby first, a wrongfully appointed administrator conveyed title to a falsely-alleged sole distributee (George) who, in turn, conveyed a deed in his individual capacity to a company wholly owned by the same administrator. The facts in [*13] this case reveal a unique scheme to defraud the court and engage it as an accomplice to cheat other distributees out of their vested interests in real property through the unlawful procurement of letters of administration and sequential execution of two deeds.

With respect to the first deed, the facts of this case are more similar to *Cruz v Cruz*, 37 AD3d 754, 832 N.Y.S.2d 217 (cited with approval by Faison v Lewis, 25 NY3d at 225-226; see also e.g. Matter of Bowser, 167 AD3d 1001, 88 N.Y.S.3d 901 [2d Dept 2018]), which affirmed the trial court's cancellation of a deed and mortgage that were obtained under the false pretense that the grantor was the "sole heir" when, in actuality, the decedent had six surviving children. The facts of this matter should mandate the same result since the grantor of the deed obtained letters of administration and conveyed the deed under the false pretense of being the designee of a sole heir. The use of letters of administration to facilitate this scheme with the intervention of an accomplice does not change this analysis. The Surrogate's Court has a tutelar responsibility to safeguard decedent's estates and prevent the filing of false petitions, particularly in light of the increasingly elaborate and fraudulent schemes it sees employed to strip distributees,

especially those from predominantly [*14] minority populated areas of the county, of their vested title and equity in real estate.

The court therefore finds that the first deed dated January 24, 2014 from Shaun, as administrator of decedent's estate to George, was procured by false pretenses and is void ab initio. The grantee, George, received nothing from the first deed since it conveyed nothing and any subsequent bona fide purchaser or bona fide encumbrancer for value received nothing (see Jiles v Archer, 116 AD3d 664, 983 N.Y.S.2d 283 [2d Dept. 2014], quoting ABN AMRO Mtge. Group Inc. v Stephens, 91 AD3d at 803). Funding Associates' Consolidated Mortgages is therefore entirely invalid to the extent they it is based on the void deed (see Marden, 160 NY 39, 54 N.E. 726; Cruz, 37 AD3d 754, 832 N.Y.S.2d 217; see also First Natl. Bank of Nev., 74 AD3d 740, 904 N.Y.S.2d 707; GMAC Mtge. Corp. v Chan, 56 AD3d 521, 867 N.Y.S.2d 204).

Turning to the second deed dated January 24, 2014 from George, individually as grantor, to D & A Development as grantee, it is manifest that George acquired no power to convey any right, title or interest of the other co-tenants in the Elmhurst property by virtue of the first deed. Nonetheless, George was already vested with his own share of title to the Elmhurst property upon decedent's death since he was a distributee. It is well settled that title to real property vests in the decedent's distributee(s) as tenants in common at the time of decedent's death (see Waxson Realty Corp. v Rothschild, 255 NY 332, 336, 174 N.E. 700 [1931]; Matter of Blango, 166 AD3d 767, 768, 89 N.Y.S.3d 100 [2d Dept 2018]; Kraker v Roll, 100 AD2d 424, 429, 474 N.Y.S.2d 527 [1984]). The vesting occurred [*15] by operation of law, regardless of the appointment of an administrator or the filing of new deeds (see In re Estate of Jemzura, 65 A.D.2d 656, 657, 409 N.Y.S.2d 445 [3d Dept 1978]; Singer v Levine, 15 Misc 2d 785, 786-787, 181 N.Y.S.2d 699 [Sup Ct Kings County 1958]; Arlo 67 LLC v Doyle, 2019 N.Y. Misc. LEXIS 4770, 2019 NY Slip Op 32550(U), 2019 WL 4131029 [Sup Ct, Kings County 2019]).

George's signing of the second deed, individually, reflects his "assent of the will to the use of the paper" for the transfer even though the assent may have been "induced by fraud, mistake or misplaced confidence" (Faison v Lewis, 25 NY3d at 225, quoting Marden, 160 NY at 50 [**5] ; see also Rosen v Rosen, 243 A.D.2d 618, 619, 663 N.Y.S.2d 228 [2d Dept 1997]). Due to his assent, George is estopped from denying the truth of the deed that he signed and it is deemed valid with respect to his part, although it is deemed invalid with respect to any of the other co-tenants who did not sign (see Kraker v Roll, 100 AD2d at 431; see also Matter of Blango, 166 AD3d at 768-769; Mu-Min v Lee, 2010 NY Misc LEXIS 3053, 2010 NY Slip Op. 31738[U], 2010 WL 28002029).

Therefore, the court finds although Funding Associates' Consolidated Mortgage is clearly invalid against the interests of any of the co-tenants (see generally Marden, 160 NY 39, 54 N.E. 726; Cruz, 37 AD3d 754, 832 N.Y.S.2d 217), it is valid insofar as giving Funding Associates security "up to the interest of the mortgagor" (Real Spec Ventures LLC v Estate of Livingston Mandel Deans, 87 AD3d 1000, 1002, 929 N.Y.S.2d 615 [2d Dept 2011]; see Bayview Loan Servicing LLC v White, 134 AD3d 755, 756, 24 N.Y.S.3d 310 [2d Dept 2015]; 123 Holding Corp. v Exeter Holding, Ltd., 72 AD3d 1040, 1042-1043, 900 N.Y.S.2d 356 [2d Dept 2010]; see also Matter of Blango, 166 AD3d at 768). In this case, such interest is equivalent to that part of George's share in the Elmhurst property he conveyed to D & A Development.

Funding Associates has established that it did not have prior actual notice of the fraudulent activity engaged in by George, [*16] Shaun or D & A Development (see Real Property Law § 266; Feggins v Marks, 171 AD3d 1014, 99 N.Y.S.3d 45; Matter of Raccioppi, 128 AD3d at 839). Additionally, while the sequential execution of the deeds, including the conveyance of title to D & A

Development for no consideration was, in the court's opinion, sufficient under these facts to provide constructive notice that D & A Development was not a bona fide purchaser for value, the documentary evidence submitted including the affidavit of Funding Associates' partner D.J. Houlihan Jr., the copy of the Perla mortgage, the prior deeds, the letters of administration, the 2015 title report and property appraisal, the investigation of George who was living at the property and copies of the leases and estoppel certificates obtained from tenants indicating that D & A Development was the owner, demonstrates that Funding Associates, in fact, conducted a reasonable inquiry into the possible defects in title attached to the Elmhurst property.

Consequently, the court finds Funding Associates has made a prima facie showing that it is a bona fide encumbrancer for value against the limited interest of the mortgagor, D & A Development.

In opposition to the branch of the motion by Funding Associates for summary judgment, the petitioner submits an affidavit [*17] of due diligence by its investigator together with exhibits showing that decedent's distributees are not merely limited to George and his three sisters, but potentially include approximately twenty (20) alleged distributees of decedent, all of them being in the class of issue of parents by representation, i.e. nieces, nephews, grandnieces and grandnephews (EPTL § 4-1.1 [a][5]). While this does not create an issue of fact requiring a trial as to the movant's status as a bona fide encumbrancer for value, it does serve to raise an issue as to the value of its interest.

Accordingly, based upon the evidence submitted, the branch of the motion by Funding Associates for summary judgment dismissing the petition based upon its affirmative defense that it is a bona fide encumbrancer for value on the entirety of the Elmhurst property (Real Property Law § 266) is granted only to the extent that the Consolidated Mortgage is deemed to attach to the partial interest in the Elmhurst property conveyed by George to D & A Development.

Upon a search of the record, the petitioner is granted partial reverse summary judgment dismissing Funding Associate's first affirmative defense to the extent it claims to be a bona fide [**6] encumbrancer for value on [*18] the entirety of the Elmhurst property (CPLR 3212 [b]), except as stated above. The balance of this issue is reserved for a kinship trial to be scheduled in the proceeding for judicial settlement of the account of the Public Administrator of Queens County to determine the number of decedent's distributees and the value of George's ownership share as a result thereof.

Funding Associates next argues that it is entitled to the "net loan proceeds" pursuant to the Standstill Agreement and it seeks a determination that the Public Administrator violated the Standstill Agreement due to its use of the sale proceeds to pay $ 156,300.00 in Federal and New York State estimated income taxes as well various expenses of administration incurred totaling $ 8,235.39.

Funding Associates' argument raised in its motion papers concerning the alleged breach of the Standstill Agreement is procedurally improper. This proceeding seeks cancellation of the deeds and mortgages and does not involve an alleged breach of a separate agreement. Funding Associates may more properly raise its objections regarding petitioner's payment of administration expenses in the proceeding for the judicial settlement of the final account of the [*19] Public Administrator of Queens County. As an aside, the court notes, however, that estate expenses are entitled to priority in payment versus other claims (SCPA 1811; EPTL § 13-1.3). Accordingly, this branch of the motion is denied without prejudice.

Funding Associates next argues that decedent's distributees are barred from asserting claims to the Elmhurst property upon the grounds of laches and equitable estoppel.

When applying the equitable doctrine of laches to an owner of real property who fails to assert his or her interest, it must be shown that the alleged owner "inexcusably failed to act when [the owner] knew, or should have known, that there was a problem with . . . title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel" (Wilds v Heckstall, 93 AD3d 661, 664, 939 N.Y.S.2d 543 [2d Dept 2012], lv denied 19 N.Y.3d 807, 973 N.E.2d 203, 950 N.Y.S.2d 105 [2012], quoting Kraker v Roll, 100 AD2d at 432-433). Equitable estoppel, in turn, "arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property and incurs expenses in reliance on that belief. The property owner must inexcusably delay in asserting a claim to the property, knowing that the opposing party has changed [its] position" causing irreversible detriment (Wilds v Heckstall, 93 AD3d at 664, quoting [*20] Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC, 78 AD3d 746, 750, 911 N.Y.S.2d 157 [2d Dept 2010]).

Funding Associates has failed to come forward with evidence that any distributees who acquired vested ownership interests in the Elmhurst property at the time of decedent's death, other than George, had actual or constructive knowledge of the scheme afoot involving Shaun and D & A Development. Laches and equitable estoppel do not apply to those distributees in the absence of evidence that they knew or should have known of the adverse claim to ownership of the real property yet stood by without objection. With respect to George, the issue is moot since he has defaulted in this proceeding and the court has determined that Funding Associates' Consolidated Mortgage is deemed valid to the extent of his share of the proceeds of the sale. Accordingly, this branch of the motion is denied.

Funding Associates seeks, in the alternative, summary judgment on its eleventh affirmative defense that it be equitably subrogated to the tax lien on the Elmhurst property that allegedly was satisfied from the Perla mortgage proceeds. The doctrine of equitable subrogation [**7] provides that where the "property of one person is used in discharging an obligation owed by another or a lien upon the property of another, [*21] under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder" (King v Pelkofski, 20 NY2d 326, 333, 229 N.E.2d 435, 282 N.Y.S.2d 753 [1967]; see Lucia v Goldman, 145 AD3d 767, 44 N.Y.S.3d 89 [2d Dept 2016]; Cashel v Cashel, 94 AD3d 684, 688, 941 N.Y.S.2d 236 [2d Dept 2012]).

In support, Funding Associates submits a copy of the tax lien certificate, evidence of the lien's sale to the Bank of New York, as well as a tax lien discharge certificate dated August 12, 2014 which corresponds to the Block and Lot of the Elmhurst property and shows that the lien was paid by "Elite Abstract and Research LLC" approximately seven months after the Perla mortgage.

Notwithstanding evidence that the tax lien has been paid, the evidence fails to establish that the proceeds of either of the mortgages were allocated to satisfy these expenses. A mortgage loan closing statement for the Perla mortgage is not provided in the moving papers and the tax lien discharge certificate otherwise makes no reference to the mortgagor or mortgagee. In addition, it appears from Funding Associates' Loan Disbursement Schedule for the consolidated mortgages that the sum of $ 207,570.64 was used to pay off the "existing" Perla mortgage which was in the principal amount of $ 200,000.00, strongly [*22] suggesting that no proceeds from that loan was used to pay off the tax lien.

Finally, Funding Associates submits a new affidavit and exhibits in reply papers attempting to cure the imperfection of its moving papers. However, the introduction of brand new evidence in reply papers to cure deficiencies in the record is improper (see Pastore v Utilimaster Corp., 165 AD3d 685, 688, 84 N.Y.S.3d 547 [2d Dept 2018]; Lee v Law Offs.

of Kim & Bae, P.C., 161 AD3d 964, 965-966, 77 N.Y.S.3d 676 [2d Dept 2018]; USAA Fed. Sav. Bank v Calvin, 145 AD3d 704, 43 N.Y.S.3d 404 [2d Dept 2016]) and, in any event, the papers submitted contain contradictory evidence of payment amounts and entities by way of checks and statements.

Based upon the documentary evidence submitted, Funding Associates has failed to make a prima facie showing of entitlement to summary judgment on its eleventh affirmative defense that it is equitably subrogated for payoff of the tax lien from the Perla mortgage proceeds. Accordingly, the branch of Funding Associates motion for a declaration that it is equitably subrogated for payment of the tax lien is denied without prejudice to renewal upon the accounting of the Public Administrator (see e.g. Cruz v Cruz, 37 AD3d at 754-755).

Settle Decree.

Dated: December 5, 2019

SURROGATE

Estate of William Raccioppi

Surrogate's Court of New York, Kings County

April 24, 2013, Published

201A/10

Reporter
2013 NYLJ LEXIS 1670 *

ESTATE OF WILLIAM RACCIOPPI, Deceased (201A/10)

(ESTATE OF WILLIAM RACCIOPPI, Deceased (201A/10), NYLJ, Apr. 24, 2013 at p.30, col.3)

Judges: [*1] Surrogate López Torres

Opinion

ESTATE OF WILLIAM RACCIOPPI, Deceased (201A/10)

COURT: Surrogate's Court, Kings County

CASE NUMBER: 201A/10

ESTATE OF WILLIAM RACCIOPPI, Deceased (201A/10) - In this contested miscellaneous proceeding, Laverne and Christopher Modeste (the respondents) have filed a motion pursuant to both CPLR §3211(a)(1) and (a)(7) and §3212, seeking to dismiss the petition by Irene Clogher as administrator (the administrator) of the estate of William Raccioppi (the decedent) for turnover of certain property alleged to have been withheld from the decedent's estate. The administrator has filed both opposition to the respondents' motion as well as a cross-motion for summary judgment, granting her petition for turnover of estate assets.

Background

The decedent died on December 8, 2003, survived by his spouse, Elizabeth Raccioppi (Elizabeth) and by the administrator, his daughter from a previous marriage. The decedent died possessed of real property, located at 718 East 40th Street, Brooklyn, New York (the real property), title to which the decedent held by deed dated July 8, 1953 (the deed), jointly with his first wife, Annabelle Raccioppi (Annabelle), the mother of the administrator.[note 2] On March 17, 2006, the real [*2] property was sold to the respondents for the sum of $380,700.00 (the 2006 transfer). The deed and transfer documents, copies of which are attached to the respondents' motion, reflect the transfer of the real property from "Annabelle Raccioppi a/k/a Elizabeth Raccioppi" to the respondents. At the closing of the transfer of the real property, Elizabeth was then a resident of Florida and appeared by her attorney-in-fact, Robert Cicale, Esq. (Cicale), pursuant to a durable power of attorney dated February 13, 2006. Her signature, as "Annabelle Raccioppi a/k/a Elizabeth Raccioppi," was affixed to the transfer documents by Cicale at the closing.

On January 15, 2010, the administrator filed a petition for letters of administration in the estate of the decedent, and letters of administration were issued to her on April 12, 2010. On September 1, 2010, the administrator filed a petition for turnover of property withheld, seeking return to the

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[note 2] Annabelle pre-deceased the decedent on September 20, 1970. The administrator asserts that the decedent married Elizabeth "in about 1972," and that they were married for over 30 years.

decedent's estate of the real property and of certain personal property alleged to be withheld by Elizabeth.[note 3] The administrator asserts therein that i) Annabelle was the "sole owner" of the real property when she died in 1970, ii) the deed executed by Cicale [*3] at the 2006 transfer was a forgery and false deed, and iii) as a consequence, the 2006 transfer is void and the real property must be returned to the decedent's estate. On November 9, 2010, this court issued an order to attend, directing the appearance of the respondents, Elizabeth, Cicale and various other persons[note 4] for examination pursuant to the provisions of SCPA §2103 (as supplemented, the order to attend).[note 5]

On May 4, 2011, the respondents filed a verified response and counterclaims,[note 6] asserting, inter alia, that Elizabeth possessed good title to the real property and thus the 2006 transfer was valid. The respondents attach as an exhibit to their response a copy of a written instrument, purporting to be the last will and testament, dated March 11, 1994 (the purported will), of the decedent. Pursuant to Article THIRD thereof, Elizabeth is named as the specific devisee of the real property, and the administrator is named as the residuary beneficiary of the decedent's estate pursuant to Article FOURTH. Pursuant to Article SEVENTH, Elizabeth is nominated as executor, while the administrator is named the successor executor of the decedent's estate. Finally, the provisions of Article FIFTH of the purported [*4] will state that the decedent "intentionally make[s] no other provision for my child, [the administrator]..."

On August 4, 2011, a guardian ad litem (the GAL) was appointed for Elizabeth, who is resident at a nursing home in Florida and is under a disability. The GAL filed an interim report on September 8, 2011, and a supplemental report on January 17, 2012. During the course of his investigations, the GAL discovered and filed the original of the purported will with this court on September 28, 2011.[note 7] The GAL report details the difficulties he encountered in securing information from Elizabeth, whom he asserts was described by her caregivers as suffering from dementia, and from her personal representative, as well as his unsuccessful efforts to locate the witnesses to the purported will. To date, the purported will has not been offered for probate. The GAL also noted that, as of the date of his report, no inquiries or examinations pursuant to the orders to attend had been conducted by the administrator.

Following numerous conferences with the court, the parties have been unable to resolve their differences. On September 7, 2012, the respondents filed the instant motion pursuant to CPLR §3211(a)(1) and (a)(7), and CPLR §3212 [*5], seeking dismissal of the administrator's petition for turnover. The administrator filed the instant cross-motion for summary judgment, directing turnover of the real property, on September 26, 2012.[note 8]

[note 3] The administrator asserts that the decedent owned personal property consisting of antiques and other valuables, "pensions, insurance, securities, brokerage and bank accounts," as well as a safe deposit box.

[note 4] The petitioner sought to examine the respondents' attorney, representatives of the respondents' lending institution and its attorney, and a representative the title insurance company, Intercounty Title Agency, Inc.

[note 5] On February 8, 2011, this court issued a supplemental order to attend, based on a supplemental affidavit of the administrator's counsel, which directed attendance for examination of Chicago Title Insurance Company, pursuant to its agency agreement with Intercounty Title Agency, Inc., which company counsel asserted is no longer in existence. Counsel further asserted in his supplemental affidavit that [*15] examination of representatives and counsel for the lending institution was no longer deemed necessary.

[note 6] No response to the respondents' counterclaims has been filed by the administrator.

[note 7] It is unclear from whom precisely the GAL discovered the original of the purported will.

[note 8] On May 4, 2012, the court discharged the GAL from his service on behalf of Elizabeth. The court notes that the administrator's cross-motion for summary judgment, in which she seeks relief against Elizabeth as well as the respondents, was served upon the GAL, who had been discharged some four months previously. There is no indication that the instant cross-motion was ever served upon Elizabeth, a person under a disability residing in Florida, or her representative. The court further notes that the GAL states in his supplemental report that Elizabeth's personal representative reported that, upon the decedent's death, the

Upon submission of their respective opposition and reply papers, the parties agreed that the court shall determine the instant motion upon the papers submitted.

Discussion

Upon consideration of a motion to dismiss pursuant to CPLR §3211, "the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994). The court shall accept as true the facts as alleged in the complaint, and shall afford the plaintiffs "the benefit of every possible inference," determining "only whether the facts as alleged fit within any cognizable legal theory." Id. at 88. A motion to dismiss a cause of action pursuant to CPLR §3211(a) (1), on the ground that the action is barred by documentary evidence, "may be appropriately granted only where the documentary evidence utterly refutes [the plaintiffs'] factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 326 (2002). See also Sullivan v. State of New York, 34 A.D.3d 443 (2d Dep't. 2006). On a motion to dismiss pursuant to CPLR §3211(a)(7), "[i]f the plaintiff can succeed upon any reasonable view of the allegations, the cause of action may not be dismissed." Hayes v. Wilson, 25 A.D.3d 586, 587 (2d Dep't 2006). With respect to the [*6] motion and cross-motion for summary judgment, it is well-settled that summary judgment is a drastic remedy and is to be granted sparingly. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). The remedy may not be granted "unless it appears that no material triable issues of fact exist." See Phillips v. Kantor & Co., 31 N.Y.2d 307 (1972).

The respondents assert that the very existence of the purported will, the original of which is on file with the court, requires dismissal of the turnover petition. By virtue of the existence of the purported will, the respondents assert, the instant turnover proceeding may not be maintained with respect to the real property, as the decedent died testate and the administrator has no rights in intestacy to the real property specifically devised to Elizabeth. They assert Elizabeth was vested with title to the real property immediately upon the decedent's death, and thus the 2006 transfer of the real property to the respondents is valid.

The respondents submit two affidavits in support of their assertion of validity of the purported will. The affidavit of Paula Rago, nee Barone (the Rago affidavit), asserts that during the period from approximately 1993 to 1994 she worked as a secretary at the law firm of Markowitz and Chorney, and that, upon review [*7] of the purported will, she affirms her signature as a witness thereto. The second affidavit, of Sally Simone Markowitz, Esq., avers that she is the daughter of Morris Markowitz, Esq. (Markowitz), a name partner in Markowitz and Chorney who is now deceased. She asserts that Alvin Jack Chorney, Esq. (Chorney), her father's law partner, is also deceased, that she worked in the offices of Markowitz and Chorney during the period from approximately 2003 to 2004, and that, upon review of the purported will, she recognizes the signature of Chorney as that of the first attesting witness thereto. The respondents assert that the proffered affidavits compel a finding that the purported will is a valid instrument. They assert that, based on this documentary evidence, the administrator's petition must be dismissed, as the real property was specifically devised to Elizabeth and thus was never an asset of the decedent's estate.

The administrator, in opposition, asserts that the decedent died intestate, and as a result she is entitled to a distributive share of his estate. The administrator asserts that she had a contentious relationship with Elizabeth, but that nonetheless she and the decedent maintained [*8] a loving relationship. The administrator avers that the decedent told her "on numerous occasions" that the

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administrator was delievered the proceeds of a bank account she held jointly with the decedent, in the amount of approximately $100,000.00, as well as personal items which had belonged to Annabelle.

real property would be left to her upon his death, subject to Elizabeth's right to remain therein for the remainder of her life. The administrator further asserts that the decedent never advised her of the existence of the purported will, and that he usually retained the services of an attorney other than those associated with Markowitz and Chorney.

The administrator avers that the purported will is a forgery, asserting that the signature of the decedent thereon is very like Elizabeth's signature on the power of attorney. The administrator further asserts that the decedent suffered from serious health issues at the time the purported will was executed, and that it was procured by the exercise of undue influence by Elizabeth. By affirmation of counsel, the administrator also impugns the credibility of the affidavit provided by Sally Simone Markowitz. She appends copies of two signatures of Markowitz, one alleged to be that affixed to his last will and testament and the other as the "Buyer's Attorney" on a real property transfer report in connection with Sally Simone Markowitz's [*9] purchase of real property. The administrator asserts that the two signatures are so dissimilar as to demonstrate that the signature on the real property transfer report, certified by Markowitz, is "obviously" a forgery. Thus, the administrator argues, Sally Simone Markowitz's affidavit testimony regarding Chorney's signature as an attesting witness to the purported will must be discredited.

"Generally, New York law treats real property as vesting in a devisee as of the moment of a testator's death..." Estate of Koppstein, N.Y.L.J., October 25, 1999, p.26 at col.5 (Sur. Ct. New York County). See also Matter of Torricini, 149 A.D.2d 401 (2nd Dep't 1998). Presumptively, title to the real property passed to Elizabeth upon the decedent's death by virtue of its specific devise under the purported will. See Corley v. McElmeel, 149 N.Y. 228, 235 (1896) (title to real property "vests in the devisee by virtue of the instrument itself, unaided by its probate"); Matter of Wright, N.Y.L.J., Dec. 17, 1997, p.27 at col.2 (Sur. Ct. Westchester County) (title to real property specifically devised "immediately devolved" at death of testator). Indeed, it has been held that title to real property vests immediately in the specific devisee notwithstanding a failure to probate the dispositive instrument. [*10] See Alfred University v. Frace, 193 App. Div. 279, 284 (4th Dep't 1920) (in action brought in equity to establish title in a devisee under an unprobated will, "probate is not at all essential before title to real property vests in the devisee"); see also Matter of Matthewson's Will, 210 A.D.572, 573 (4th Dep't 1924) (title to real property vasted in specific devisee at death of testor "irrespective of the failure to probate the will"); Matter of Payson, 132 Misc.2d 949, 950 (Sur. Ct. Nassau County 1986) ("title to real property devised under the will of a decedent vests in the beneficiary at the instant of the testator's death... title passes by reason of the will and not its probate"). The respondents assert, therefore, that the simple fact of the purported will, even absent its probate, vested Elizabeth with title to the real property pursuant to its dispositive provisions, and thus the 2006 transfer of the real property is valid.[note 9]

Notwithstanding that title to real property devised pursuant to a will vests at the moment of the testator's death, where such title is challenged, it may be established "upon production and proof then being made of its validity as the devisor's will." Corly, at 235. Nonetheless, the simple act of filing the original of the purported will with this court does not operate to prove its validity. The Second Department, in In re Billet, 187 A.D. 309, 311 (2nd Dep't 1919), held that

[a] paper writing purporting to be a last will and testament [*11] of a decedent, which is simply filed in the surrogate's office, does not thereby, ipso facto, become a valid will, but can only be established as such in a proper proceeding initiated for that purpose.

See also In re Pearle's Estate, 92 N.Y.S.2d 319

[note 9] It has also been held that an executor's deed is not required to pass title to real property.

(Sur. Ct. New York County 1949) ("a testamentary paper becomes a valid will not by mere filing thereof but only due admission to probate"); Matter of Cameron, 47 A.D. 120, 123 (3rd Dep't 1900) ("the existence of a valid will cannot be presumed, but it must be shown to have been executed and published as prescribed by our statues by a persona having testamentary capacity"). But see Estate of Williams, N.Y.L.J, Sept. 1, 2011, p. 20 at col. 1 (Sur. Ct. Queens County) (in action by Public Administrator to evict decedent's relative, a non-distributee, from real property nineteen years after decedent's death, "naked allegations" regarding existence of will specifically devising such property are insufficient demonstration of likelihood of success on the merits to warrant issuance of preliminary injunction). The respondents' motion for dismissal pursuant to CPLR §§3211(a)(1) and (7) may not be granted based on the mere presence of an original testamentary instrument filed in the offices of the Surrogate's Court. While title to the real property resided presumptively with Elizabeth by [*12] virtue of its specific devise by the purported will, the validity of that instrument, and as a consequence the validity of her title, has been challenged. Accordingly, the respondents' motion to dismiss the instant turnover petition pursuant to the provisions of CPLR §3211 is denied.

With respect to the motion and cross-motion for summary judgment, the arguments of both parties focus primarily, as expected, on the question of the purported will's validity. Despite the fact that the purported will has been on file with the court since September 2011, no petition for probate thereof has been offered. Even so, the respondents offer the Rago affidavit as well as the affidavit of Sally Simone Markowitz in support of a finding of the purported will's regularity. In opposition, the administrator argues, variously, that the purported will is invalid, that it is a product of undue influence and/ or forgery, that the deed executed from "Annabelle Raccioppie a/k/a Elizabeth Raccioppi" at the 2006 transfer is fraudulent, and that the respondents are somehow prevented from relying thereon by Elizabeth's "unambiguous election to ignore the will at [the 2006 closing]." It is notable that, despite this court's [*13] issuance of the order to attend, the administrator proffers no evidence based on any examination or deposition regarding the circumstances of the 2006 transfer.

The existence of an unprobated testamentary instrument, which purports to make specific devise of the primary asset of the estate, presents triable issues of fact regarding the validity of Elizabeth's title to the real property at the time of the 2006 transfer, as well as the administrator's entitlement to a distributive share of the decedent's estate in intestacy. The evidence submitted by both the respondents and the administrator is insufficient to establish either parties' entitlement to judgment as a matter of law. The same issue of fact precludes a grant of summary judgment to either party in the instant proceeding. Accordingly, both the respondents' motion for summary judgment dismissing the turnover petition and the administrator's cross-motion for summary judgment directing turnover of the real property to the estate are hereby denied.

April 12, 2013

See, e.g., [*16] Estate of Green, N.Y.L.J., June 9, 1999, p. 32 at col 2 (Sur. Ct. Queens County); Estate of Schiff, N.Y.L.J., Feb. 8, 1989, p. 25 at col. 1 (Sur. Ct. Nassau County).

New York Law Journal

Corley v. McElmeel

Court of Appeals of New York

March 11, 1896, Argued ; April 14, 1896, Decided

No Number in Original

Reporter
149 N.Y. 228 *; 43 N.E. 628 **; 1896 N.Y. LEXIS 701 ***

Rose Corley, Appellant, v. James McElmeel et al., Appellants, and Annie E. Stover et al., Respondents

Prior History: [***1] Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 13, 1895, which affirmed a judgment rendered at Special Term in favor of the defendant Annie E. Stover upon a verdict obtained on a trial of an issue of fact at Circuit, and also affirmed an order denying a motion for a new trial.

Corley v. *McElmeel*, 87 Hun, 23, affirmed.

Disposition: Judgment affirmed.

Case Summary

Procedural Posture
Appellants, heirs and executors, sought review of the judgment of the General Term of the Supreme Court in the Second Judicial Department (New York), which affirmed a judgment in favor of respondent devisee and also affirmed an order that denied a motion for a new trial in an action for the partition of certain real estate.

Overview
One of the heirs brought an action for the partition of certain real estate, which was left to the devisee. The heir's complaint alleged the presentation of the will to the surrogate's court and a decree thereof adjudging the will to be void. The devisee received a verdict in her favor, and the appellate court affirmed. Appellants sought review, arguing that the devisee waived her right to a jury trial because the surrogate's court had jurisdiction to determine all questions relating to the factum of the will and the devisee had appeared in that proceeding. The court found that, conceding the full jurisdiction of the surrogate to determine the questions relating to the factum of a will, it was not intended by the New York Code of Civil Procedure to be an exclusive jurisdiction. The court also found that there was no waiver of the constitutional right to a trial by jury of the title to the land devised. The court held that the devisee did nothing to debar herself from meeting the issue tendered by the complaint as to the will and from having its validity, as a testamentary disposition of the testator's land, determined by a jury summoned for the purpose.

Outcome
The court affirmed the lower courts' judgment in favor of the devisee.

Syllabus

The nature of the action and the facts, so far as material, are stated in the opinion.

Counsel: *Charles E. Hughes* and *Edward F. Dwight* for Margaret McCloskey, appellant. The Surrogate's Court has jurisdiction to determine all questions relating to the factum of wills of real property offered [***3] for probate. (Redf. on Surr. 150; Code Civ. Pro. §§ 1866, 2472, 2545, 2547, 2550, 2611-2617, 2622, 2623-2625, 2629; *In re Bartholick*, 141 N. Y. 172; *Anderson* v. *Anderson*, 112 N. Y. 104; Woerner on Admin. §§

139, 141-145; Laws of 1799, chap. 4; Laws of 1801, chap. 77; Laws of 1802, chap. 110; Laws of 1806, chap. 148; Laws of 1807, chap. 145; Laws of 1810, chap. 36; Revised Laws of 1813, chap. 79; *Brick's Estate*, 15 Abb. Pr. 14-30; Laws of 1786, chap. 27; *Bowen* v. *Sweeney*, 89 Hun, 365; *Jackson* v. *Blanshan*, 3 Johns. 292; *Jackson* v. *Le Grange*, 19 Johns. 386; *In re Delaplaine*, 2 Civ. Pro. Rep. 35; *Kirby* v. *Potter*, 4 Ves. Jr. 748; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Blood* v. *Kane*, 130 N. Y. 514.) The parties to this controversy were parties to the special proceeding in the Surrogate's Court and there litigated upon the merits the questions relating to the factum of the will. (Code Civ. Pro. §§ 2615, 2616, 2617, 2623.) The respondent Stover waived her right to a trial by jury. (Const. N. Y., art. 1, § 2; *Baird* v. *Mayor, etc.*, 74 N. Y. 386; *Lee* v. *Tillotson*, 24 Wend. 337; *T. Nat. Bank* v. *Shields* [***4] , 55 Hun, 274; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319; *Moffatt* v. *Mount*, 17 Abb. Pr. 4; *Shenfield* v. *Bernheimer*, 43 N. Y. S. R. 383; *Greason* v. *Keteltas*, 17 N. Y. 498; *W. P. I. Co.* v. *Reymert*, 45 N. Y. 705; *Hartman* v. *M. R. Co.*, 82 Hun, 531.) Between the parties to this action, the decree of the Surrogate's Court is conclusive proof that the will was obtained by fraud and undue influence. (Herman on Est. 109; Chase's Stephen's Digest, 87; *Powers* v. *Bank*, 129 Mass. 44; *Steinbach* v. *R. F. Ins. Co.*, 77 N. Y. 498; *Bowen* v. *Sweeney*, 89 Hun, 364; Code Civ. Pro. § 2625; *Montgomery's Case* 2 Atk. 378; *Schultz* v. *Schultz*, 10 Gratt. 358; *Dublin* v. *Chadbourne*, 16 Mass. 433; *Tompkins* v. *Tompkins*, 1 Story, 547; *Osgood* v. *Breed*, 12 Mass. 525; *Parker* v. *Parker*, 11 Cush. 519.) The decree of the Surrogate's Court is *prima facie* evidence of the invalidity of the will. (*Baxter* v. *Baxter*, 76 Hun, 98; *Smith* v. *Bonsall*, 5 Rawle, 80.)

Robert Sewell for appellants McElmeel, McCarron and Corley. The surrogates decree was conclusive. (Code Civ. Pro. [***5] §§ 2473, 2626, 2627; 2 Black on Judgments, §§ 633, 640; Wells on Res Ajudicata, §§ 422, 429; *O'Connor* v. *Huggins*, 113 N. Y. 511; *In re Hood*, 90 N. Y. 512; *Tompkins* v. *Tompkins*, 1 Story, 547; Woerner on Admin. §§ 139, 141-145; *In re Delaplaine*, 2 Civ. Pro. Rep. 35; *Bogardus* v. *Clark*, 1 Edw. Ch. 266; *Dickinson* v. *Hayes*, 31 Conn. 417; *Loring* v. *Steinman*, 1 Metc. 204; *Bolton* v. *Schriever*, 135 N. Y. 65; *Anderson* v. *Anderson*, 112 N. Y. 104.) It is a fundamental maxim of the law that one shall not be twice vexed by the same cause of action. (*Duchess of Kingston's Case*, 2 Smith's L. C. 580; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Jetter* v. *Hewitt*, 22 How. [U.S.] 352; *Gates* v. *Preston*, 41 N. Y. 113; *Collins* v. *Bennett*, 46 N. Y. 495; *Smith* v. *Hemstreet*, 54 N. Y. 644; *Brown* v. *Mayor, etc.*, 66 N. Y. 385; *Blair* v. *Bartlett*, 75 N. Y. 150; *Dunham* v. *Bower*, 77 N. Y. 76; *Garrett* v. *Boering*, 68 Fed. Rep. 51.) The decree of the surrogate should have been admitted as presumptive evidence of the invalidity of the will, or at least as some evidence of its invalidity. ([***6] *Baxter* v. *Baxter*, 76 Hun, 98; *Smith* v. *Bonsall*, 5 Rawle, 80, Code Civ. Pro. § 2626.)

Charles J. Patterson, Ayres & Walker and *Boardman & Boardman* for respondents. The decree of the surrogate of the city and county of New York refusing probate to the will of Patrick Trenor, deceased, was not a conclusive adjudication against the right of Annie E. Stover to claim the real estate devised to her by that instrument, in this action. (*Riggs* v. *Cragg*, 89 N. Y. 479; *In re Underhill*, 117 N. Y. 471; *In re Hawley*, 104 N. Y. 250; *Jackson* v. *Rumsey*, 3 Johns. Cas. 234; *In re Kellum*, 50 N. Y. 298; Code Civ. Pro. § 2627; *In re Gouraud*, 95 N. Y. 256; *Norris* v. *Norris*, 32 Hun, 175; 63 How. Pr. 319; *Jackson* v. *Blanshan*, 3 Johns. 292; *Jackson* v. *Le Grange*, 19 Johns. 386; *Jackson* v. *Hasbrouck*, 12 Johns. 192.) The legislature never intended to have tried in the Surrogates' Courts upon probate proceedings the questions of title to land arising between the heir and devisee growing out of the existence of the will. (*Bogardus* v. *Clark*, 4 Paige, 623; *Weston* v. *Stoddard*, 137 N. Y. 128; *Lewis* v. *Cocks* [***7] , 23 Wall. 470; S. & W. on Titles, § 170; *Ward* v. *Ward*, 23 Hun, 431; Code Civ. Pro. § 2547; Laws of 1891, chap. 174; Laws of 1892, chap. 627; *In re*

Gouraud, 95 N. Y. 256; *Hoyt* v. *Hoyt*, 112 N. Y. 504, 505; *Baxter* v. *Baxter*, 76 Hun, 98; *Smith* v. *Bonsall*, 5 Rawle, 80.) The appellants cannot claim here that the surrogate's decree was presumptive evidence against the will, because they did not present that point on the trial before Mr. Justice Gaynor. (*McKeon* v. *See*, 51 N. Y. 300; *Clews* v. *Kehr*, 90 N. Y. 635; *Sterrett* v. *T. Nat. Bank*, 122 N. Y. 659; *Mook* v. *Parke, Davis & Co.*, 9 Misc. Rep. 90; *Akersloot* v. *S. A. R. R. Co.*, 30 N. Y. S. R. 146.) The decree of the surrogate was not admissible as presumptive evidence against the existence and validity of the will. (Code Civ. Pro. §§ 2498, 2499, 2627; *Bogardus* v. *Clark*, 4 Paige, 623; *Harris* v. *Harris*, 26 N. Y. 433; *Hoyt* v. *Hoyt*, 112 N. Y. 504; *Bethlehem* v. *Watertown*, 51 Conn. 490.)

Judges: Gray, J. Bartlett, J., dissenting. All concur, with Gray, J., for affirmance, except Bartlett, J., who dissents on grounds stated in memorandum.

Opinion by: [***8] GRAY

Opinion

[*232] [**629] In order to have a clearer understanding of the appellant's case, it is necessary to state a few facts connected with the litigation. The action was brought by plaintiff, as one of the heirs at law of Patrick Trenor, deceased, for the partition of certain real estate, of which he died seized, and she joined as parties defendant the other heirs, the executors of his will and Mrs. Stover, to whom he had devised his real estate. The complaint alleged the presentation of the will to the Surrogate's Court of the city and county of New York for probate and a decree thereof adjudging the will to be void; for having been obtained by fraud. The answer of the respondent Stover asserted the validity of the will and claimed the property devised to her thereby. When the issues came on for trial in the Supreme Court, before Mr. Justice Kellogg and a jury, the surrogate's decree above mentioned being offered in evidence by plaintiff and being objected to, a stipulation of the parties was entered into; whereby all the issues, except that touching the validity of the will, were to be tried by the court without a jury and, if it should thereupon be decided that [***9] the validity of the will had not been determined conclusively, that that issue should be tried at some subsequent term of the court by a jury. The jury then being discharged, the surrogate's decree was received in evidence and decision was reserved as to its effect. Thereafter, Mr. Justice Kellogg filed his decision; which found the facts as to the relationship of the parties and as to the proceedings for and upon the probate of the will; also, that Mrs. Stover, "claiming to be a legatee under the said alleged will and testament, duly appeared and was a party to the proceeding, etc.;" and that the decree of the surrogate had adjudged the will to be void. As conclusions of law, he held that the decree was not conclusive as to the parties claiming under the will; that the will [*233] might be proved in the action by any party claiming any interest in the lands and that, under the stipulation, the issue touching the validity of the will must be tried by a jury. Thereafter, that trial came on before Mr. Justice Gaynor and a jury; who rendered their verdict in favor of Mrs. Stover upon the issues and, upon the receipt of that verdict, the court rendered a decision that she was [***10] entitled to a judgment dismissing the complaint upon the merits; adjudging the validity of the will and that she became seized, in fee simple absolute, of the real estate described in the complaint. Upon that trial plaintiff's counsel, before opening the case to the jury, offered the decree of the surrogate in evidence "on the ground that it was *res adjudicata*" and argument pro and con was heard upon this proposition. The court excluded it and again, when, after opening the case, the offer of the decree was repeated, its admissibility was placed upon the ground stated in the argument; namely, that it was *res adjudicata* and the "final determination of the rights of the parties."

The General Term affirmed the judgment, and, upon this appeal, the appellants have insisted, in

substance, that as the Surrogate's Court had jurisdiction to determine all questions relating to the *factum* of the will, and as Mrs. Stover had voluntarily appeared in that proceeding, where the merits were fully litigated, she had waived her right to a trial by jury and that, as between the parties, the surrogate's decree was conclusive proof of the invalidity of the will. The appellants do claim, [***11] also, that the decree was *prima facie* evidence of the invalidity of the will and should have been received upon the trial as evidence of that character, in aid of the plaintiff's case. It is difficult to see how this court, in its review of the determination made below of the issues between the parties, can disregard the record and look beyond its statement of the proceedings upon the trial, without assuming a scope of jurisdiction not intended, nor understood, to be exercised by it. We cannot say, nowithstanding the insistence of counsel, in the absence of a statement to that effect, that the surrogate's decree was offered as *prima facie* evidence, if not [*234] admissible as evidence of a prior adjudication conclusive upon the litigants now. Indeed, it [**630] seems strange, if the offer and argument upon this later trial related to the admissibility of the decree as *prima facie* evidence, that it should not so appear upon the record. The appellants made up the record on appeal and must have had in mind, as they had before them, the opinion of Mr. Justice Kellogg upon the preceding trial; wherein he suggested, but without nndertaking to decide it, the question [***12] of the decree being admissible in that character. This fact and the preciseness of the statement in the appeal book forbid us from regarding the record otherwise than as it is made to appear. The introduction of the decree might, or might not, have had an effect upon the minds of the jurors; but it is too late to argue the question now. The question then is, whether the decree of the Surrogate's Court concluded the respondent, Mrs. Stover. She was not cited upon the proceeding there and she was not a necessary party to the probate of the will. The finding of the court as to her appearance is that she did appear, claiming to be a legatee under the will, and continued to be a party to the proceeding. While the term "legatee" is somewhat indiscriminately used to describe one who takes personalty or realty under the provisions of a will, we cannot say that Mrs. Stover was not, in strict legal parlance, interested as a legatee, as well as a devisee, and that being the case, her appearance in the contest before the surrogate may have been to aid the proponents of the will in establishing its conclusiveness as a will disposing of the testator's personalty; of which, as it was, also, [***13] found, he died possessed to an amount sufficient to pay his debts and his legacies. If we take a broader view of Mrs. Stover's appearance in the proceeding, we are not able to say, however unnecessary and however general it was, that it was at the risk of her being concluded by the result, in so far as the realty was concerned, and as to the personalty bequeathed, her appearance had no effect upon the decree to make it any the more conclusive. The decree of the surrogate admitting to probate a will proposed [*235] is conclusive as an adjudication, with respect to its competency to distribute the testator's personal property, and this conclusiveness extends to all parties duly cited, or who appear, until reversed on appeal, or revoked by the surrogate. (Code, § 2626.) Its rejection, though not expressly provided for, obviously, prevents its operation as a will of personalty. What is the effect as to the real property devised? A distinction suggests itself, at once, when considering the effect of the proceedings for the probate of a will disposing of real and personal property, and that is that probate is essential to authenticate the title of the executor to administer upon [***14] the latter species of property; while, as to the former, title vests in the devisee by virtue of the instrument itself, unaided by its probate. A will is competent at any time to establish a devisee's title, upon production and proof then being made of its validity as the devisor's will.

By section 2627 of the Code, when the decree admits a will of real property to probate, it establishes presumptively only all the matters determined by the surrogate, and upon the trial of

an action, in which a controversy arises concerning it, it may be read in evidence, with the testimony taken in the probate proceeding. The omission to provide as to a decree, which refuses admission to probate, is noticeable and somewhat suggestive. It is true that there is no provision relating to the finality of a decree which rejects a will of personal estate. But that does not seem so striking; inasmuch as without admission to probate the will is inoperative and the executor is without authority to distribute under its provisions. The will may be the foundation of the executor's title; but it is essential to a valid exercise of the authority conferred by its provisions, that letters shall be granted to [***15] him by the Surrogate's Court. As before said, admission of a will to probate is not essential to validate the devisee's title to the realty.

The jurisdiction of the surrogate is only such as is conferred by the statute and though a scheme for the determination of the *factum* of wills of real property, as well as those [*236] of personal property, is provided by the Code of Civil Procedure, it is not to be regarded as exclusive of the right, which existed at common law in favor of heir and of devisee, to a trial by jury of the question of the title to the testator's real property. The surrogate's decree, as to a will of personalty, is made conclusive by force of the statutory provision, (Code, § 2626), giving it such effect, if favorable to the will; and if unfavorable, it is, in fact, conclusive; because the transmission and distribution of the property bequeathed are checked. It was always considered, when the provisions of the Revised Statutes were the source of the surrogate's authority, that his decree did not, and could not, conclude the question of the validity of a testamentary devise of real property, in a subsequent litigation involving the title thereto. ([***16] *Bogardus* v. *Clark*, 4 Paige, 623; *Harris* v. *Harris*, 26 N. Y. 433.) We think that is true now under the Code. That the surrogate's admission to probate of a will of real property has its advantages is, of course, plain enough. In the first place, it entitles the will to be recorded as a proved will and, in the second place, in a subsequent litigation over the real property devised, the devisee defending his title has the benefit of the presumption arising from the production of the surrogate's decree and the testimony upon which it was rendered. Also, the devisee is protected against the claim of a purchaser in good faith from the heir at law. (Code, § 2628.) These are manifest advantages and render the admission of the will to probate a desirable thing; but they are only advantages and nothing more. The title of the devisee is still open to litigation at the instance of the heir at law, who is not concluded by anything [**631] which has taken place in the Surrogate's Court.

The learned counsel for the appellants have not been able to sustain their position by the authority of any decided case; but rely upon these two propositions. The Surrogate's Court had [***17] authority to determine all questions relating to the *factum* of the will in question -- an authority which had expanded, from the narrow limitations existing with respect [*237] to Surrogates' Courts prior to the Revised Statutes of 1830, into the completer jurisdiction conferred by the present Code -- and possessing that jurisdiction, the respondent, Mrs. Stover, by making herself a party to the proceeding there, must be regarded as having waived her right to a trial by jury and as being concluded by the decree of the surrogate. There is, seemingly, some ground for the objection to the legal view of two trials being possible; wherein, as between the same parties, different results may be reached in the two courts. But that cannot be allowed to have weight; unless there is a question of policy, which should compel us to hold a different view and to say that one trial of the question of the *factum* of a will is enough. Overlooking the point that the finding of fact describes the respondent's, Mrs. Stover's, appearance in the surrogate's proceeding as having been in her capacity as a legatee, we should hesitate to say that any public policy demanded the denial of her right [***18] as devisee to a trial by jury, in such a case, and we think that such a right, existing as it did at the time of the adoption of the State Constitution, was preserved thereby and is inviolate. The right to a jury trial, when a devise of

real estate was in question, was deemed at common law to belong to the heir or devisee, and that it continues to exist would seem to follow from the provision of the Constitution, which guaranteed it in all cases, in which it had been previously used. The Code recognizes the right; when it provides that in the action of partition, which the heir may bring and in which he may put in issue the validity of a devise, the issue of fact is triable by jury. (§§ 1537, 1544.) And when the Code makes the decree admitting to probate a will of real property presumptive evidence only, in a subsequent action, and fails to provide as to the effect of a decree refusing probate, we have some evidence of the legislative understanding that the surrogate's decree is not to be conclusive as an adjudication. Nor would it be just to give a greater effect to the decree which rejects, than to that which admits a will. The purpose of the Code is to give a *prima facie* [***19] force, in a subsequent controversy over the will, to a decree admitting [*238] it to probate; but in case of the refusal to admit, the decree is given no legal effect upon subsequent litigation, and its effect is necessarily confined to the proceeding initiated before the surrogate.

It may be observed that the result of a proceeding in the Surrogate's Court denying probate to a will disposing of real estate, etc., is of importance to the devisee; for whereas, if the will is admitted to probate, the decree is presumptive evidence and he may read in evidence the testimony taken in the proceeding in which it was made, with full force and effect, in a subsequent action; the failure of probate leaves the devisee under the burden of establishing the will, in respect of its execution and of its validity. Notwithstanding the extension of the limits of the surrogate's jurisdiction, we perceive no sufficient reason for departing from the former rule, which allowed those claiming under a will to set it up and to establish their title by common-law evidence, in an action where the title to the real estate devised is involved, notwithstanding a failure to have the will probated. (*Harris* [***20] v. *Harris, supra*.) Conceding the full jurisdiction of the surrogate to determine the questions relating to the *factum* of a will, disposing of the testator's real property, we cannot hold it to be, or to have been intended by the Code to be, an exclusive jurisdiction.

Nor can we hold that there was any waiver of the constitutional right to a trial by jury of the title to the land devised. While that, as a personal right, is capable of being waived, the case must be one where the right exists as an absolute one and that was not this case. It was a matter of discretion with the surrogate to direct a trial by jury of the issues of fact. (Code § 2547.) It is not a sufficient answer to say that the respondent (devisee) might have demanded such a trial from the surrogate. It should have been an absolute right, which not being insisted upon, the law might consider as having been waived.

We have considered the question broadly, notwithstanding that we are indisposed to regard the appearance of Mrs. Stover in the Surrogate's Court as other than in her capacity as [*239] a legatee of a portion of the personalty. Though unnecessary, and though the contest was over facts [***21] concerning the making of the will, which were involved in this action, we think she had done nothing thereby to debar herself from meeting the issue tendered by the complaint as to this will and from having its validity, as a testamentary disposition of the testator's land, determined by a jury summoned for the purpose.

The questions presented by this appeal are not without difficulty and the counsel for the appellants have argued them upon their briefs with much skill; but we are not convinced that there has been any error in their determination and our consideration of the case leads us to the conclusion that the judgment appealed from should be affirmed, with costs.

Dissent by: BARTLETT

Dissent

Bartlett, J., dissents on the following grounds:

[**632] 1. The Surrogate's Court having jurisdiction to determine the *factum* of a will of real property, its decree against the validity of such a will is presumptive evidence of its invalidity and should have been admitted at the trial as having that effect.

2. The proceedings before Judges Kellogg and Gaynor, in the light of the stipulation, are practically one trial, and the respondents are in no position to aver surprise as to appellants' [***22] claim that the decree was at least competent as presumptive evidence of the invalidity of the will.

In re Estate of Tucker

Surrogate's Court of New York, New York County

September 6, 1973

No Number in Original

Reporter
75 Misc. 2d 318 *; 347 N.Y.S.2d 845 **; 1973 N.Y. Misc. LEXIS 1639 ***

In the Matter of the Estate of Spurgeon Tucker, Deceased

Case Summary

Procedural Posture
Petitioner executors filed an objection in the court to the executors' account submitted by a guardian ad litem of the infant contingent remaindermen, posing the question of the executors' right to commissions on unsold realty, which the remaindermen conveyed in unequal shares to themselves as trustees of two residuary trusts.

Overview
The executors filed an objection to the executors' account submitted by the guardian ad litem of the infant contingent remaindermen. The executors contended that, inasmuch as executorial judgment and action were required respecting the realty, it had to be deemed to have been received and paid out within the meaning of N.Y. Surr. Ct. Proc. Act Law § 2307. The court entered a decision in favor of the executors. The court determined that there was need for the executors to take over the property, arrange for payment of all taxes, debts and expenses to the extent that other assets were available, and to make provision for satisfaction of all obligations and definition of the rights of all beneficiaries, principal, and income. The court, therefore, found that the executors had "received, distributed or delivered" real property within the meaning of N.Y. Surr. Ct. Proc. Act Law § 2307(2), and that they were entitled to commissions for receiving and paying it.

Outcome
The court entered a decision in favor of the executors in the objection filed by the executors to the executors' account submitted by the guardian ad litem.

Counsel: *Hughes, Hubbard & Reed* for executors, petitioners.

Max Lerner, guardian ad litem for Caroline Ewert and another.

Judges: S. Samuel Di Falco, S.

Opinion by: DI FALCO

Opinion

[*319] [**846] An objection to the executors' account by the guardian ad litem of infant contingent remaindermen poses the question of the executors' right to commissions on unsold realty which they conveyed in unequal shares to themselves as trustees of two residuary trusts. The realty passed under the residuary clause of the will which directed a division in two equal parts, one [***3] of which was set up in a marital deduction trust and the other in trust for the benefit of the widow, with a limited power to appoint to issue or, failing appointment, then in further trust for the two daughters or their issue. The will directed that all estate taxes be paid out of the

second part of the residuary estate. It is this allocation which resulted in trusts of unequal size.

The gross estate was valued at slightly over $ 1,171,000 of which $ 950,000 represented the value of the parcel of realty. The debts and administration expenses, including taxes, were just under $ 250,000. Thus it is patent that the executors would either have to sell the realty or arrange to divide it between two trusts of unequal size. The will gave the executors broad power to sell the realty and it authorized them "to make distributions (including distributions to themselves as trustees) in kind or in money, or partly in each, in shares which may be composed differently", except, of course, that the marital deduction trust could not include any asset which would imperil the marital deduction. The executors accordingly distributed 64.55% of the realty to the marital trust and 35.45% to the [***4] [*320] second trust. Each trust principal is proportionately indebted to income for funds borrowed to meet principal obligations for debts and expenses.

The executors contend that, inasmuch as executorial judgment and action were required respecting the realty, it must be deemed to have been received and paid out within the meaning of SCPA 2307. The guardian ad litem relies upon the well-established rule that, when real property vests pursuant to the terms of the will and the executorial power of sale expires, the executors are not entitled to commissions on [**847] such real property even where the executors confirm the legatees' title by a fiduciary's deed. (*Matter of Saphir*, 73 Misc 2d 907, 909-911.) No one disputes the general rule. What the executors say is that there are exceptions to that rule and that this case comes within the exceptions.

In *Matter of Roth* (53 Misc 2d 1066, 1068-1070, mod. 29 A D 2d 941) this court adverted to some of the fundamental principles governing fiduciary compensation in the State of New York. The rules enacted by the Legislature represent an effort to furnish a standard which fairly measures the value of fiduciary services [***5] and at the same time minimizes the need for and the expense of litigation over such fees. For an executor, the test is the value of the property which he is "receiving and paying out." (SCPA 2307.) The courts have given to the words just quoted a reasonable meaning in line with the general purpose of the statute, rather than a strict literal interpretation. (*Matter of Schinasi*, 277 N. Y. 252, 259-260.) Real property usually passes directly to a devisee by virtue of the terms of the will, and hence it does not ordinarily form part of the body of property which is administered by the executor. Unless the realty is devised to him, the executor does not take title to realty, although he may have power to sell it. That title passes directly from the testator to the devisee without any act on the part of the executor is sometimes cited in support of the finding that the executor did not receive the realty within the meaning of the commission statute, but the real basis of the decisions is that the executor performed no act in relation to the realty under authority given to him by the will or under general rules of law. (See *Matter of Salomon*, 252 N. Y. 381, 384.)

The policy [***6] guiding the interpretation of the statute is perhaps nowhere more clearly revealed than in the cases relating to specific legacies. An executor does take a qualified title to property which is specifically bequeathed (*Blood* v. *Kane*, [*321] 130 N. Y. 514, 517), but he has no real responsibility in respect of it and no duty to collect and administer it (*Matter of Scull*, 186 App. Div. 377, 381; see, also, *Matter of Roth*, 53 Misc 2d 1066, 1070). Hence the courts from the beginning excluded such property from the commission base, and the Legislature confirmed that policy in the statute which plainly says that the authority to consider other property as money (i.e., the commission base) "shall not apply in case of a specific legacy or devise." (SCPA 2307, subd. 2.) In spite of that explicit exclusion of specific legacies from the commission base, the courts have nonetheless consistently allowed commissions based upon the subject matter of specific legacies whenever the will required executorial action with

respect to that specific property. (*Matter of Roth*, 29 A D 2d 941; *Matter of Lane*, 55 Misc 2d 88; *Matter of Kuker*, 22 Misc 2d 63; [**848] *Matter* [***7] *of Mattes*, 12 Misc 2d 502; *Matter of Marshall*, 199 Misc. 431; *Matter of Berwind*, 181 Misc. 559; *Matter of Brooks*, 119 Misc. 738, affd. 212 App. Div. 868; *Matter of Grosvenor*, 105 Misc. 344; *Matter of Fisher*, 93 App. Div. 186.) As we said in *Matter of Kuker* (*supra*, p. 65), the statute must be read with an eye to its purpose of fixing the dollar value of services necessarily rendered by the executor, and the test is whether the will requires performance of regular executorial duties with respect to the property specifically bequeathed.

There is no explicit provision in the statute excluding realty from the commission base except where it is specifically devised. On the contrary, the statute originally said that the value "of any real or personal property" was to be considered as money in the computation of commissions (Surrogate's Ct. Act, § 285, subd. 2), and the use of the word "property" in the present statute is meant to include realty as well as personalty (SCPA 103, subd. 41), so long as it is "received, distributed or delivered" (SCPA 2307, subd. 2).

Although there are but few cases which allowed commissions on unsold realty, they proceed upon [***8] somewhat the same ground as those dealing with specific legacies. In *Matter of Condax* (11 Misc 2d 819), the realty had been the subject of a partition action instituted by the decedent, continued by the executors, and ultimately settled. In *Matter of Robords* (69 Misc 2d 1026), the will directed the realty to be sold and the proceeds divided between two daughters, but it also provided that if either daughter should desire to own the property it should be conveyed to her at one half the price determined by appraisal. One daughter did express that desire and the property was [*322] conveyed as directed by the will. In *Matter of Fox* (N. Y. L. J., Aug. 15, 1968, p. 10, col. 4), the residuary estate was given in fractional shares and the executors exercised their authority to distribute in kind by conveying the realty to the trustee in satisfaction of the trust's share of the residue. In *Matter of Tenny* (N. Y. L. J., April 17, 1967, p. 20, col. 5), Surrogate Silver allowed commissions in a similar situation, ruling that the executor had acted in the sound exercise of his executorial duties. In *Matter of Kennedy* (133 Misc. 904), the five residuary legatees agreed [***9] upon a distribution in kind, whereby one was to take all real estate and the others received all personal property in equal shares. In all of these cases commissions were allowed on the realty. The allowance in each case must necessarily have been predicated on a finding that the executor had "received [and] distributed" the real property, although such a finding was not expressed in all cases.

On the other hand, commissions were denied in *Matter of Saphir* (73 Misc 2d 907) in a decision in which Surrogate Sobel [**849] extensively reviewed the subject of commissions on real property. There one third of the property was set up in trust for the benefit of the widow, remainder to their son, and the residue was given in trust for the son until he reached a specified age. The major asset of the estate was income-producing realty which the executor trustee administered, paying the income proportionately to the beneficiaries. When the residuary trust terminated, the son petitioned the court to turn over the realty to him for management inasmuch as he now owned two-thirds outright and had a remainder interest in the rest. The widow consented. The court ordered the fee conveyed [***10] to him after appropriate provision for the continuing trust by way of mortgage. The executor claimed commissions on the value of the realty conveyed pursuant to the court order. After a comprehensive review and discussion of the decisions relating to commissions on real property, Surrogate Sobel decided that the case before him did not constitute an exception to the general rule and that the executor had not received and distributed the property within the meaning of section 2307. As trustee, the fiduciary was held to have received the property but not to have distributed it under section 2309.

There are differences between the fact situation in that case and the facts in the present case, though it may well be arguable whether the differences are so great as to call for a different result. In the *Saphir* case, the executor never made any transfer or conveyance to himself as trustee. He managed the [*323] property for some three years until one trust terminated. He had been managing it as trustee, and he also sought commissions for his services as trustee. In the latter capacity he took title to the realty for trust purposes and for the period of the trust, but as executor [***11] he did nothing but permit the property to vest in the trustee pursuant to the terms of the will. In the pending case, the executors did make the determination to distribute the property in kind so that it could be held for its investment value, rather than to sell it and use the proceeds in satisfaction of the balance of debts, expenses and the funding of the trust. To allow the realty to vest in the trustees of the two trusts in accordance with the terms of the will would have been objectionable because the trusts would not have been liquid, the estate taxes would not have been paid in full and adequate provision would not have been made for all expenses. Hence there was need for the executors to take over the property, arrange for payment of all taxes, debts and expenses to the extent that other assets were available and to make provision for satisfaction of all obligations and definition of the rights of all beneficiaries, principal and income.

The court therefore finds that the executors have "received, distributed or delivered" real property within the meaning of SCPA 2307 (subd. 2), and that they are entitled to commissions for receiving and paying it. The decision does [***12] not depend upon purely technical principles, [**850] such as passing of legal title, but represents what is deemed to be a reasonable interpretation of the statute, that is, that it intends to fix reasonable compensation in a particular estate by application of the statutory rates to the body of property which the executors must take under administration and in respect of which they assume a risk of personal liability toward persons interested, for their taking, holding and disposition.

In re Freund

Surrogate's Court of New York, Schoharie County

October 27, 1994, Decided

File No. 1989-040

Reporter
162 Misc. 2d 965 *; 618 N.Y.S.2d 515 **; 1994 N.Y. Misc. LEXIS 480 ***

In the Matter of the Estate of Fred Freund, Also Known as Frederick Freund, Deceased.

Notice: [***1] EDITED FOR PUBLICATION

Case Summary

Procedural Posture

Plaintiff successor executor filed an application pursuant to N.Y. Surr. Ct. Proc. Act Law art. 19 for an order directing the sale of estate real property for the sum of $ 75,000 to pay expenses of administration, debts of decedent, estate taxes, widow's right of election, and for payment and distribution of their respective shares to the persons entitled thereto.

Overview

Decedent died testate on February 28, 1989 and was survived by his estranged widow, and two sons, the successor executor and the bankrupt, as his distributees. The decedent's last will and testament directed payment of debts and funeral expenses and gave, devised, and bequeathed all the rest, residue and remainder of his property, both real and personal, to his two sons equally. Subsequent to decedent's death, the bankrupt incurred numerous money judgments and tax liens. Later, the successor executor filed the application with the court for the sale of the estate real property for $ 75,000, which was the only significant asset of the estate. The court held that the bankrupt's one-half residuary net equitable interest in the estate was limited to one half of the amount remaining after payment of all legitimate estate expenses and charges. These included funeral expenses, attorney's fees, expenses of administration, valid debts of decedent, estate taxes, and the widow's statutory right of election because title passed to the bankrupt and the other beneficiaries on the date of decedent's death.

Outcome

The application was granted in all respects. The attorney for the successor executor was directed to submit an order directing the sale of the estate real property for the sum of $ 75,000.

Counsel: *Parshall & West (Michael A. West* of counsel), for Thomas Freund, petitioner. *William McCarthy* for Roger Freund. *DiFabio, Tommany & Legnard, P. C. (Michael D. DiFabio* of counsel), for Allied Electric Supply, Inc., and another.

Judges: Dan Lamont, S.

Opinion by: Dan Lamont, S.

Opinion

[*966] [**516] Dan Lamont, S.

The successor executor makes application pursuant to SCPA article 19 for an order of the Surrogate's Court directing the sale of estate real property for the sum of $ 75,000 to pay expenses of administration; debts of decedent; estate taxes (if any); widow's right of election; and for payment and distribution of their respective shares to the persons entitled thereto.

[*967] For the reasons which follow, the Surrogate holds and determines that the application should be granted in all respects.

BACKGROUND

Frederick Freund died testate on February 28, 1989, survived by his estranged widow, Gene Scheck Freund, and two sons, Roger Freund and Thomas Freund--as his distributees. His last will and testament admitted to probate March 16, 1989 directs payment of debts and funeral expenses and gives, devises and [***2] bequeaths all the rest, residue and remainder of his property, both real and personal, to his two sons, Roger Freund and Thomas Freund, equally, share and share alike. The named executors, Roger Freund and Thomas Freund, were granted letters testamentary on March 16, 1989.

The decedent's widow's right of election has been valued at $ 28,000 pursuant to a written agreement signed and acknowledged on March 7, 1989 by all interested parties, to wit: Gene Scheck Freund, widow; Roger Freund, one-half residuary beneficiary; and Thomas Freund, one-half residuary beneficiary.

The only significant asset of the estate is real property reasonably worth $ 75,000. The only personal property in this estate amounted to about $ 7,500 (cash and automobile). Rental income from the estate real property in the amount of $ 8,500 has been collected during administration.

Roger Freund subsequent to decedent's date of death has incurred numerous money judgments and tax liens against himself totaling in excess of $ 50,000 and has filed a petition in bankruptcy on or about May 1, 1991. Roger Freund has obtained a discharge in bankruptcy dated September 30, 1991. Roger Freund resigned as coexecutor [***3] on December 15, 1992, and his resignation was accepted and successor letters testamentary were issued to Thomas Freund on April 12, 1993.

Thomas Freund, as successor executor, has brought a proceeding pursuant to SCPA article 19 for the sale of the estate real property for $ 75,000 to be ordered by the Surrogate to pay expenses of administration, attorney's fees, estate taxes, widow's right of election, real property taxes in excess of $ 12,000 which have accrued on the subject real property, and to distribute their respective shares to the persons entitled thereto. The petition proposes that after payment of the real estate commission ($ 7,500); all outstanding real estate taxes ($ 12,679.52); estate taxes, penalties and interest ($ 6,560); a valid claim against the estate ($ 4,434); balance of widow's [*968] valid claim against the estate ($ 2,500); the widow's elective share ($ 28,000); and legal fees and [**517] disbursements ($ 7,500) that approximately $ 3,000 be paid to Thomas Freund as one-half residuary beneficiary and $ 3,000 be paid to William M. McCarthy, Esq., as trustee in bankruptcy for Roger Freund, the other one-half residuary beneficiary.

The judgments [***4] and liens filed in the Schoharie County Clerk's office against Roger Freund are as follows:

Go to table1

The issue presented is whether the Surrogate's Court pursuant to SCPA article 19 can order the sale of estate real property to pay expenses of administration, attorney's fees, estate taxes, claims against the estate, widow's right of election, and to effect distribution, [***5] free and clear of the judgment creditor's liens against Roger Freund, bankrupt, one of the residuary beneficiaries.

SCPA ARTICLE 19 PROCEEDING

The estate real property consists of 74 acres of land, more or less, at the intersection of New York State Route 10 and Moxley Street, in the Town of Jefferson, Schoharie County, improved by a single-family residence in extremely poor condition and several collapsed outbuildings. The residence is in need of major structural repairs including a new roof. The roof trusses and other structures needed

to support a new roof [*969] are rotted through. The estate real property has been actively offered for sale by the estate through real estate brokers and agents, and the present cash offer for $ 75,000 is the only purchase offer ever received. The Surrogate is fully satisfied that the sale of the estate real property for the cash sum of $ 75,000 is reasonable, proper, and in the best interests of the estate.

The application by successor executor Thomas Freund to sell the estate real property was brought upon notice to the decedent's widow, Gene Scheck Freund (creditor: $ 2,500, and widow's right of election: $ 28,000); the other residuary [***6] legatee, Roger Freund, bankrupt; William McCarthy, Esq., trustee in bankruptcy for Roger Freund; Marie Burghart (claimant against estate: $ 4,434); and all of the above-listed judgment creditors of Roger Freund, the bankrupt one-half residuary legatee.

The trustee in bankruptcy has consented to the sale by the executor *provided that* Roger Freund's *net equitable interest* in the estate as one-half residuary beneficiary is paid over to the trustee in bankruptcy.

Two judgment creditors of Roger Freund, to wit: Selkirk Hardware, Inc. ($ 688.34) and Allied Electric Supply, Inc. ($ 2,701.94) have appeared by legal counsel and have filed written objections to the proposed sale *unless* such judgment creditor's liens are fully paid off and satisfied from the proceeds of the sale of the estate real property.

No other interested parties have appeared or opposed the within application by the successor executor for an order authorizing him to sell the estate real property for the sum of $ 75,000 cash pursuant to SCPA article 19.

DEBTOR AND CREDITOR LAW: ARTICLE 6

The successor executor has requested the Surrogate's Court pursuant to Debtor and Creditor Law, article 6, § 150 [***7] to grant an order directing that an unqualified discharge of record be marked upon the docket of the judgments of record against Roger Freund, bankrupt. If relief is obtainable by the successor executor as an interested person under Debtor and Creditor Law § 150 which provides for cancellation of record of judgments discharged in bankruptcy, such application *must* be made to the court in which the judgment was rendered, or if rendered in a court not of record, the court of which it has become a judgment by docketing it therein--*not* to the Surrogate's [*970] Court [**518] (Debtor and Creditor Law § 150). Generally speaking, a judgment lien which attaches to real property *prior to* the debtor's bankruptcy petition is *not* affected by the subsequent discharge in bankruptcy *(Matter of Leonard v Brescia Lbr. Corp.,* 174 AD2d 621 [2d Dept 1991]); therefore, the successor executor is most probably not entitled to relief under Debtor and Creditor Law § 150 even upon application to the proper court. The Surrogate's Court has no jurisdiction to entertain the application under the Debtor and Creditor Law.

DISCUSSION

Since an executor clearly has broad authority [***8] and power pursuant to EPTL 11-1.1 (b) (5) to sell real property, Surrogates have increasingly taken the position that proceedings under SCPA article 19 should *not* generally be entertained and/or should be denied in the absence of extraordinary circumstances *(see, e.g., Matter of Osterndorf,* 75 Misc 2d 730 [Sur Ct, Nassau County 1973]). This Surrogate, however, holds and determines that where the successor executor seeks the safeguards and protection of an order to sell real property pursuant to SCPA article 19 for the specific purposes enumerated in SCPA 1902 upon notice to all conceivably interested parties, the proceeding can and should properly be entertained by the Surrogate.

As previously stated, the issue presented is whether the Surrogate's Court pursuant to SCPA article 19 can order the sale of estate real property--to pay

expenses of administration, attorney's fees, estate taxes, valid claims against the estate, widow's right of election, and to effect distribution of their respective shares to the persons entitled thereto--free and clear of the liens of the judgment creditors against Roger Freund, bankrupt, one of the residuary beneficiaries. Notwithstanding [***9] the fact that insolvent heirs with substantial judgment liens of record against them cannot have been all that rare of an occurrence in the annals of New York estates involving real property, this Surrogate has been unable to locate any reported cases or legal precedent directly on point.

"[T]he law in this State is that real property title vests in the distributees on the date of death and in devisees once the will is probated, subject to the power of sale possessed by the fiduciary *(Trask v Sturges,* [170 NY 482])." *(Matter of Fello,* 109 Misc 2d 744, 746 [Sur Ct, Nassau County 1981], *appeal denied* 88 AD2d 600 [2d Dept 1982], *affd* 58 NY2d 999 [1983].)

[*971] SCPA 1904 (2) provides: "If the petition be entertained process shall issue to all persons interested and also to the creditors if the court so directs." The Court of Appeals has held that a judgment creditor of a devisee or distributee should be given notice of a proceeding to sell the real property of a decedent *(Matter of Townsend,* 203 NY 522 [1911]). The Court stated: "Though the lien of a judgment creditor on the real estate of his debtor is general and not specific, he has [***10] a substantial interest to protect in the proceeding. The effect of granting the application is to destroy his lien on the real estate" *(supra,* at 524).

This Surrogate holds and determines that the title to the real property which passes to the residuary legatees of the will upon the testator's death is *subject to divestment* by order of the Surrogate directing the disposition of decedent's real property pursuant to SCPA article 19 for the purpose of payment of expenses of administration, payment of funeral expenses, payment of valid debts of decedent, payment of estate taxes, payment of any legacy charged thereon, and/or for payment and distribution of their respective shares to the persons entitled thereto.

In this Surrogate's view, the bankrupt one-half residuary beneficiary's *net equitable interest* in this estate is limited to one half of the amount remaining after payment of all legitimate estate expenses and charges including funeral expenses, attorney's fees, expenses of administration, valid debts of decedent, estate taxes (if any), and the widow's statutory right of election; therefore, the bankrupt one-half residuary beneficiary's *net equitable interest* [***11] in this estate is certainly [**519] *not* substantial. The judgment creditors of Roger Freund, bankrupt, face the same impediments as to the residuary benefits of this estate as does Roger Freund, and such judgment creditors clearly should not and cannot be placed in any better position than Roger Freund--nor for that matter, the other residuary beneficiary, Thomas Freund.

Parenthetically, the widow's right of election (one-third *net* estate; *see,* EPTL 5-1.1) has been substantially overvalued by the written agreement signed by decedent's widow and the two residuary beneficiaries on March 7, 1989, *prior to probate.* Such written, signed, acknowledged agreement filed in the Surrogate's Court on March 16, 1989 was made prior to now bankrupt Roger Freund's incurring any judgments of record and over two years prior to his filing a petition in bankruptcy [*972] on or about May 1, 1991. Therefore, such agreement fixing the value of the widow's right of election does *not* appear by any stretch of the imagination to be a fraud upon the subsequent judgment creditors of Roger Freund.

A proceeding pursuant to SCPA article 19 constitutes a *judicially ordered sale* [***12] by the Surrogate's Court--a court with broad equitable jurisdiction and powers--for the purposes specifically enumerated and authorized by SCPA 1902, to wit: payment of the expenses of administration; payment of funeral expenses;

payment of the debts of the decedent, including judgment or other liens; payment of any estate or other death tax; payment of any debt or legacy charged thereon; payment and distribution of their respective shares to the persons entitled thereto; and/or for any other purpose the court deems necessary. The fundamental purpose of such proceeding is to convert an estate asset owned by the decedent from real property to cash in order to pay estate obligations, debts of decedent, and to distribute their respective shares to the persons entitled thereto.

The very purpose and intent of SCPA article 19 would be completely frustrated to the detriment of other innocent parties in interest *including* other estate beneficiaries *unless* the Surrogate's Court can order the sale of estate real property free and clear of judgment liens of record against an estate beneficiary. For instance, suppose that the sole asset of an estate were real property worth $ 100,000 [***13] devised to five residuary legatees: A, B, C, D, and E; and further suppose that D had incurred judgments of record against him in the amount of $ 100,000 on or after the decedent's date of death. The only fair, logical, and equitable solution consistent with the purpose and intent of SCPA article 19 is that the Surrogate's Court upon proper application can and should order the sale of the estate real property for the sum of $ 100,000, thereby divesting A, B, C, D, and E of title, and thus disposing of the estate real property free and clear of the liens of any judgment creditors of D. The final decree of the Surrogate's Court would provide that $ 20,000 be paid to A; $ 20,000 be paid to B; $ 20,000 be paid to C; and $ 20,000 be paid to E; and that the remaining $ 20,000 be paid to D or to the judgment creditors of D in order of the priority of their judgment liens. The position espoused by judgment creditors Selkirk Hardware, Inc. and Allied Electric Supply, Inc. in this proceeding would cause A, B, C, and E to receive no money whatsoever [*973] from the hypothetical estate because of the $ 100,000 in judgment liens against D--hardly a fair or equitable result.

The Surrogate's [***14] Court in ordering a sale pursuant to SCPA article 19 directs that the *decedent's interest in the real property* be sold and conveyed unencumbered by the interests of the estate beneficiaries and/or their judgment creditors. The first and paramount concern of the Surrogate and the primary purpose and focus of SCPA article 19 proceedings should be to do justice to *persons interested in the estate of the decedent.*

Although the Court of Appeals has held that a fiduciary who had prior notice of an outstanding indebtedness of a legatee had no active duty to the judgment creditor except the proper administration of the estate and that there was no authority permitting payment of such indebtedness from estate funds *(Sayles v Best,* 140 NY 368 [1893]), this Surrogate is *not* persuaded that such rule should apply in this case where a [**520] judicially ordered sale of real property pursuant to SCPA article 19 destroys the various judgment creditors' liens upon the bankrupt residuary devisee's undivided one-half interest in the real property. Where the judgment debts of the one-half residuary beneficiary are discharged in bankruptcy, the net interest in the estate of the [***15] bankrupt one-half residuary beneficiary should be paid to the trustee in bankruptcy because the bankrupt residuary beneficiary's net one-half interest in the estate constitutes an asset in the bankruptcy proceeding.

CONCLUSIONS OF LAW

The Surrogate holds and determines that the within application to sell the estate real property for the sum of $ 75,000 cash should be and the same hereby is granted in all respects, and that such a judicially ordered sale by the Surrogate's Court to satisfy administration expenses, attorney's fees, estate taxes, debts of decedent, and widow's right of election *shall be free and clear of any and all judgment liens of record* against the one-half residuary beneficiary, Roger Freund, bankrupt. The *net equitable interest* of Roger Freund, bankrupt, as one-half residuary beneficiary *of the estate,* will be

determined upon the final accounting and will be directed in the final decree to be paid by the successor executor to [*974] William McCarthy, Esq., as trustee in bankruptcy for Roger Freund.

Attorney for successor executor to submit order directing the sale of the estate real property for the sum of $ 75,000 pursuant to SCPA article [***16] 19 in accordance with this decision.

Table1 (Return to related document text**)**

Date	Judgment Creditor	Amount
07/30/90	NYS Dept. of Labor	
	Unemployment Insurance Division	$1,107.84
11/14/90	Selkirk Hardware, Inc.	688.34
11/14/90	Allied Electric Supply, Inc.	2,701.94
11/30/90	NYS Dept. of Taxation & Finance	11,542.83
11/30/90	NYS Dept. of Taxation & Finance	1,467.86
12/04/90	Enders & Cooper, Inc.	9,817.98
01/15/91	Insul Mart	1,836.65
03/08/91	NYS Dept. of Labor	
	Unemployment Insurance Division	808.44
03/11/91	Kenneth Rossi Doing Business As	
	Rossi Carpet Gallery	5,515.91
05/13/91	Niagara Mohawk	1,275.18
05/16/91	NYS Dept. of Taxation & Finance	2,174.79
05/21/91	Colonial Plumbing Corp.	11,819.45
06/28/91	NYS Dept. of Taxation & Finance	649.90
06/30/93	NYS Dept. of Taxation & Finance	3,250.00
	TOTAL:	$54,657.11

Table1 (Return to related document text**)**

End of Document

DeLuca v Samuels

Surrogate's Court of New York, Nassau County

September 10, 2018, Decided

2016-389031/B

Reporter
2018 N.Y. Misc. LEXIS 3947 *; 2018 NY Slip Op 32262(U) **

[**1] Jeffrey DeLuca, Public Administrator of Nassau County, as Administrator of the Estate of CATHLEEN R. SMITH, Deceased, Petitioner, -against- KAREN SAMUELS, "JOHN DOE" and "JANE DOE,", Respondents.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: [*1] For Petitioner: Richard T. Kerins, Esq., Mahon, Mahon, Kerins & O'Brien, LLC, Garden City South, New York.

Karen Samuels, Respondent, Pro se, Uniondale, New York.

Judges: PRESENT: HON. MARGARET C. REILLY, Judge of the Surrogate's Court.

Opinion by: MARGARET C. REILLY

Opinion

DECISION

Before this court is a petition by the Public Administrator, as administrator of the Estate of Cathleen R. Smith, to recover possession of the decedent's real property. This proceeding was brought on by order to show cause returnable on March 7, 2018. The Public Administrator seeks an order and decree pursuant to NYRPAPL § 711[1], SCPA §1901[2][h], and EPTL §11.1.1[b][5]: to award him possession of the real property known as and located at 750 Macon Place, Uniondale, New York (the "Property"); issuing a warrant of eviction to the Sheriff of the County of Nassau to remove Karen Samuels, "John Doe," and "Jane Doe" from the Property; directing the Sheriff of the County of Nassau to execute the aforesaid warrant; awarding a money judgment against Karen Samuels, "John Doe," and "Jane Doe" in favor of petitioner in an amount equivalent to the cumulative use and [**2] occupancy of the Property from December 25, 2015 [the date of death] through the date of delivery of possession; awarding a money [*2] judgment against Karen Samuels, "John Doe" and "Jane Doe" in favor of petitioner in an amount equivalent to the amount required to be paid by the Public Administrator to repair and remedy the damage caused by Karen Samuels, "John Doe," and "Jane Doe", if any, to the Property from December 25, 2015 through the date of delivery of possession; and granting petitioner the power to sell the Property. Respondents have served and filed a verified answer and affidavit.

The decedent, Cathleen R. Smith, died intestate on December 25, 2015, survived by two daughters, respondent Karen Samuels and Rebecca Samuels a/k/a Rebecca Daniels. Letters of administration issued to the Public Administrator by decree, dated July 7, 2017, after both daughters applied for letters of administration and agreed to the appointment of the Public Administrator. The only listed asset is the Property, though Karen Samuels asserts that that the estate has damage claims against others.

The petition alleges that pursuant to SCPA § 1902, the Public Administrator is statutorily authorized to sell the decedent's real property in order to pay: (a) expenses of administration, (b) funeral expenses, (c) estate creditors, including real property [*3] taxes, (d) estate taxes, (e) debts or legacies, (f) the respective shares of decedent's estate to the distributees of decedent's estate, and (g) for any other purpose the court deems necessary.

The Public Administrator claims that the Property must be sold in order to pay estate administration expenses, to pay and satisfy decedent's creditors and to pay and make distributions to decedent's distributees. He claims upon information and belief that the [**3] respondents were residing in the premises prior to the decedent's death pursuant to an oral, month to month agreement with the decedent. After decedent's death, respondents have continued to reside in and occupy the premises. The Public Administrator served a 30-day Notice to Quit Occupancy of the Premises (Real Property Law § 232-b) on September 19, 2017, thereby notifying respondents of the termination of their purported tenancy. The Public Administrator further claims that despite this notice, the respondents have continued to reside in and occupy the premises.

The petition invokes EPTL § 11-1.1[b][5] and SCPA § 1902. Under EPTL § 11-1.1[b][5], with respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of, the fiduciary [*4] may take possession of, collect rents from, manage and sell same at public or private sale.

SCPA Article 19 addresses the power of a fiduciary to dispose of estate property, including the "real property of a decedent" (SCPA § 1901[1]). Under SCPA § 1902, the fiduciary is statutorily authorized to sell the decedent's real property in order to pay: (a) expenses of administration, (b) funeral expenses, (c) debts of the decedent [but not mortgage liens], including real property taxes, (d) estate taxes, (e) debts or legacies, (f) the respective shares of decedent's estate to the distributees of decedent's estate entitled thereto, and (g) for any other purpose the court deems necessary.

As relevant, the Public Administrator's verified petition claims that the Property must be sold in order: [a] to pay the expenses of administration, [b] to pay and satisfy decedent's creditors, and, [c] to make distributions to decedent's distributees. It is alleged that [**4] respondents have failed to pay the mortgage lien holders and have caused waste to the Property. The petition then alleges that, if and to the extent that any tenancy or right to use and occupy the subject property was granted to respondents, any such tenancy has been effectively [*5] terminated by the Public Administrator based upon Petitioner's purported compliance with RPL § 232-b.

The verified answer asserts that Karen Samuels is a distributee of the decedent, is not a tenant and has never been a tenant but is a fifty percent (50%) owner of the Property. She asserts, therefore, that the only persons who can properly sell the Property are her and her sister, the other distributee. In that, she is mistaken.

"[A] fiduciary has a superior right to that of a beneficiary ...to possess and manage the decedent's realty so that [he] may sell the property in accordance with the statutory authority with which estate fiduciaries are imbued as well as to collect the rentals thereof, and otherwise preserve the asset and make it productive to all those with a beneficial interest therein" (*Matter of Pastorelli*, 2002 NY Misc LEXIS 2009 *3 [Sur Ct, Suffolk County, November 21, 2002]; *see also Matter of Rice*, 8 Misc 3d 1001[A], 2005 NY Slip Op 50878[U] [Sur Ct, Nassau County 2005]). Furthermore, although title to the real property of an intestate decedent vests upon death in the statutory distributees by operation of law, the vesting is subject to the power of the administrator to sell the property to pay debts and/or administration expenses and make distribution (*Kinard v Rosenblatt*, 39 Misc 3d

1215[A], 975 N.Y.S.2d 366, 2013 NY Slip Op 50617[U] [Sur Ct, Queens County 2013]).

Here, the petition alleges that sale of the property is necessary to [*6] pay debts and administration expenses. The answer filed does not rebut these allegations and they are, [**5] therefore, due proof of the facts asserted (SCPA § 509; *Matter of Wigfall*, 20 Misc 3d 648, 859 N.Y.S.2d 864 [Sur Ct, Westchester County 2008]).

Accordingly, the petition is **GRANTED**, in its entirety. In addition, respondents are prohibited from interfering in any manner with the possession, control or management of the premises by the Public Administrator for the purpose of selling the premises, which the Public Administrator is authorized and empowered to do pursuant to EPTL § 11-1.1.

The matter is scheduled for a hearing on the issue of charges for use and occupancy (*Matter of Seviroli*, 31 AD3d 452, 818 N.Y.S.2d 249 [2d Dept 2006]) and damage on December 10, 2018 at 10:00 a.m. The issue of costs shall be addressed after the hearing on the charges for use and occupancy and damage.

A warrant of commitment may be submitted without notice.

This constitutes the decision and order of the court.

Dated: September 10, 2018

Mineola, New York

ENTER:

/s/ Margaret C. Reilly

HON. MARGARET C. REILLY

Judge of the Surrogate's Court

72634552 Corp. v Okon

Surrogate's Court of New York, Kings County

May 20, 2018, Decided

2010-2817/B

Reporter
2018 N.Y. Misc. LEXIS 9633 *; 2018 NY Slip Op 51991(U) **; 63 Misc. 3d 1222(A); 114 N.Y.S.3d 813; 2018 WL 8222374

[**1] 72634552 Corp., Plaintiff, against Joseph Okon, YVETTE APPLEBAUM, et al., Defendants.

Notice: NOT FOR PUBLICATION

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Reported at Estate of 72634552 Corp. v. Okon, 2019 NYLJ LEXIS 237 (Jan. 23, 2019)

Decision reached on appeal by, Summary judgment denied by 72634552 Corp. v. Okon, 189 A.D.3d 1317, 134 N.Y.S.3d 812, 2020 N.Y. App. Div. LEXIS 7939, 2020 WL 7636650 (Dec. 23, 2020)

Counsel: [*1] Attorney for Plaintiff: Garfield A. Heslop, Esq., Heslop & Kalba, LLP, Brooklyn, NY.

Attorney for Defendants: Dipo Akinola, P.C., Brooklyn, NY, Margarita Lopez Torres, J.

Judges: HON. MARGARITA LÓPEZ TORRES.

Opinion by: MARGARITA LÓPEZ TORRES

Opinion

Margarita López Torres, S.

The following papers were considered in these motions:

Papers Numbered

Defendants' Notice of Motion, Attorney Affirmation in Support, and Affidavit in Support by Joseph Okon 1, 2, 3

Plaintiff's Notice of Cross-Motion, Attorney Affirmation in Support, Affidavit in Support by Samiel Hanasab, and Affidavit in Support by Aubrey Marquez 4, 5, 6, 7

Defendants' Affirmation in Opposition to Plaintiff's Cross-Motion and In Reply to Plaintiff's Opposition 8

Plaintiff's Reply Affirmation in Further Support of Cross-Motion and in Further Opposition to Motion 9

This action, commenced on October 7, 2011, was transferred to this Court by order dated February 8, 2016 of Hon. Richard Velasquez, Supreme Court, Kings County. Plaintiff 72634552 Corp. commenced this action in Supreme Court against defendants Joseph Okon and Yvette Applebaum for partition and sale of a parcel of real property that is an asset of the estate of defendants' mother, Mildred Applebaum (decedent). [*2] Defendants now move to nullify and invalidate the deed purporting to convey the share in real property beneficially held by the [**2] defendants' sister, Pamela McKenzie, who post-deceased the decedent. Plaintiff cross-moves for summary judgment for an order to determine plaintiff's and

defendants' respective interests in the real property, and for an order of partition and sale of the property.

BACKGROUND / FACTUAL ALLEGATIONS

The decedent died on July 26, 2010, leaving a Last Will and Testament (Will) that devised her residuary estate to her three children, Joseph Okon (Okon), Yvette Applebaum (Applebaum), and Pamela Mckenzie (Mckenzie), in equal shares, and nominated Okon as executor. The Will was admitted to probate and letters testamentary were issued to Okon on January 25, 2012. The decedent's estate includes a one-family home located at 258 Fenimore St., Brooklyn, NY (real property), which was not specifically devised, but rather is part of the residuary estate. The decedent's Will provides, in pertinent part, as follows:

> FIRST: I direct my [Executor] to pay all of my just debts and funeral expenses as soon as practicable after my death.
>
> SECOND: I give, devise and bequeath my entire [*3] residuary estate, whether real, personal or mixed, of whatsoever kind and nature and wheresoever situated, which I may own or be entitled to at the time of my death, to my children [Okon, Applebaum and Mckenzie] to share and share alike.

***

> FIFTH: I give my [Executor] the fullest power and authority in all matters and questions, and to do all acts which I might or could do if living, including without limitation, complete power and authority to retain any and all property, whether real, personal or mixed, and to sell, mortgage, lease, dispose of and distribute in kind, any and all said property, at such times and upon such terms and conditions as [he] may deem advisable.

According to plaintiff, almost 6 months prior to the letters testamentary being issued, Mckenzie allegedly conveyed her interest in the real property to plaintiff by deed dated August 17, 2011. McKenzie has since died.[1] The alleged "bargain and sale deed with convenant against grantor's acts," recorded with the NYC Department of Finance on or about September 29, 2011 (deed), states that McKenzie, conveyed a 33.33% interest in the real property to plaintiff "in consideration for Ten Dollars and other valuable consideration [*4] paid by" plaintiff. The "recording and endorsement cover page" (cover page) for the deed identifies Yuval Golan as its presenter. The cover page states that no NYC Real Property Transfer Tax was paid and $40.00 was paid in NYS Real Estate Transfer Tax. Plaintiff also submits a copy of an untitled document allegedly signed by McKenzie on August 17, 2011 and bearing the signature of "witness" Aubrey Marquez. The document states in pertinent part as follows:

> Pamela L. McKenzie... hereby acknowledges that she met with or spoke with the [**3] purchaser and negotiated with the purchaser the terms of an agreement to sell and convey her interest in real property known as 258 Fenimore Street, Brooklyn, New York. Pamela L. McKenzie acknowledges that Robert D. Gelman, Esq. did not participate in these negotiations.
>
> Pamela L. McKenzie acknowledges and understands that Robert D. Gelman, Esq. reviewed with her the death certificate of her mother, the title report, and contract of sale, a deed, and transfer tax returns, and advised her that Robert D. Gelman, Esq. represented only the purchaser in this transaction, and that Robert D. Gelman, Esq. did not represent Pamela L. McKenzie. Pamela L. McKenzie acknowledges [*5] that she affirmatively

[1] The parties did not submit documentary proof that McKenzie is, in fact, deceased, nor did they provide a date of death. However, the parties do not dispute that she is now deceased. Neither have the parties informed the court whether a fiduciary has been appointed for her estate, or whether McKenzie was survived by spouse and/or issue. The parties do not address the issue of whether McKenzie's estate should have been made a party to this litigation. For purposes of this decision, however, disposition is proper without the necessity of McKenzie's estate being represented herein.

> advised Robert D. Gelman, Esq. that she did not wish to review the contract of sale, deed, or transfer tax returns with her own attorney, and that she knowingly and willingly entered into the agreement with the purchaser, and that she understands she is knowingly and voluntarily executing a contract that will bind her to transfer ownership to 72634552 Corp., and she is knowingly and voluntarily executing a deed that will IMMEDIATELY and IRREVOCABLY transfer to 72634552 Corp. of all of her right, title, and interest in real property known as 258 Fenimore Street, Brooklyn, New York. Accordingly, Pamela L. McKenzie hereby releases Robert D. Gelman, Esq. and holds Robert D. Gelman, Esq., harmless for any actions concerning the conveyance of Pamela L. McKenzie's interest in real property known as 258 Fenimore Street, Brooklyn, New York to 72634552 Corp.
>
> Pamela L. McKenzie requested that the purchaser's attorney, Robert D. Gelman, Esq. prepare a contract of sale, a deed, and transfer tax returns on her behalf to bind her and the purchaser in a transaction to sell and to purchase all of the right, title and interest of Pamela L. McKenzie in real property known as 258 [*6] Fenimore Street, Brooklyn, New York, to 72634552 Corp. or its assignee. Pamela L. McKenzie acknowledges... that Robert D. Gelman, Esq. did *not* represent her or her interests.

While the document states that plaintiff's attorney was to prepare a "contract of sale" and "transfer tax returns," no copies of any such documents have been submitted, nor is there any indication that such documents were ever prepared. There is no document before the court to show that McKenzie signed an agreement specifying any sale price or consideration other than the "Ten Dollars" noted on the deed. Rather, plaintiff submits a copy of a cashed check in the amount of $10,000 dated April 17, 2011, made out to McKenzie. Plaintiff claims that amount was the full consideration given for McKenzie's one-third interest in the real property. Further, in support of the claim that McKenzie knowingly and voluntarily agreed to the transaction and accepted $10,000 in full consideration thereof, plaintiff submits the affidavits of Samiel Hanasab (Hanasab), purportedly the President of 72634552 Corp., and Aubrey Marquez (Marquez), purportedly a witness to the transaction.

Hanasab states in his affidavit that on August 17, [*7] 2011, McKenzie and his company "came to an agreement" that his company would purchase her interest in the real property. Hanasab denies that McKenzie was coerced, under duress, or "not in her right frame of mind" when entering into the agreement. Hanasab further states that McKenzie brought her "friend" Marquez to Hanasab's office to witness McKenzie sign the "disclosure agreement" (ostensibly the untitled document referenced above) and deed. Hanasab does not provide any details as to how he and McKenzie first met and "came to an agreement;" how long McKenzie was given to [**4] consider the agreement and retain her own counsel; why no contract was prepared and signed by the parties; and whether anyone advised McKenzie about the fair market value of the real property.

Marquez states in his affidavit that he was a neighbor of McKenzie and knew her for five years prior to her death. Marquez further states that on an unspecified date, McKenzie informed him that she had inherited an interest in the real property and that she wished to sell her interest to plaintiff. McKenzie further informed him that the closing of the sale was to take place on August 17, 2011 and asked Marquez to attend "for [*8] support." Accordingly, Marquez went to plaintiff's office that day where the "disclosure statement" and deed were presented to McKenzie. Marquez also states that he saw McKenzie read and sign the documents and accept a check in the amount of $10,000. Marquez also read the "disclosure statement" and signed as a witness. He then accompanied McKenzie to the bank where he witnessed her cash the check. Marquez contends that based upon his

observations, McKenzie was fully aware of what she was doing and not under any duress, or the influence of medications, drugs, or pain.[2] Defendants assert that the value of the real property, located in the Crown Heights neighborhood of Brooklyn, is worth in excess of $1,800,000 and that plaintiff's alleged purchase of McKenzie's one-third share in the real property for merely $10,000 is a product of fraud, and otherwise unconscionable as a matter of law. Okon also submits an affidavit in support of defendants' motion stating that at the time of the transaction, McKenzie had been diagnosed with a number of chronic and terminal illnesses; been in and out of many drug rehabilitation centers; and was addicted to pain medications and on Tramadol and Oxycontin, [*9] which affected her mental capacity and ability to understand the nature of the "complex real estate transaction at the time of the alleged conveyance." Accordingly, defendants assert that the transaction was a product of plaintiff's principal Yuval Golan's "immoral coercion" over McKenzie, who was compromised due to her weakness, addictions, poor health, and inability to think independently.[3]

THE INSTANT MOTION AND CROSS-MOTION

Defendants' Motion to Nullify and Invalidate Deed

Defendants move for an order (a) nullifying and invalidating the deed as having been conveyed without authority from this court or the executor of the estate, and in violation of the terms of the decedent's Will; (b) forever barring plaintiff and all other persons claiming an interest in the estate or the real property under the deed; and (c) assessing punitive damages against plaintiff for "fraudulent, outrageous and unlawful" acts.[4] The grounds for

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[2] Defendants further contend that Marquez is a runner for plaintiff, who assists plaintiff in finding and preying upon vulnerable homeowners and beneficiaries of estates.

[3] Defendants allege that plaintiff's principal, Yuval Golan, has a history of engaging in predatory tactics or outright fraud to obtain valuable real property from vulnerable homeowners and heirs of estates in Brooklyn for far below market value. Defendants submit copies of recorded deeds on a number of Brooklyn real properties that were allegedly purchased by Yuval Golan from heirs of estates.

Defendants also submit a copy of the decision in *Matter of Vita Vaughn*, a case in Richmond County Supreme Court, in which Samiel Hanasab and Yuval Golan, as principals of Golan Developers Corp. (Golan Developers), were named as defendants. That decision describes Vita Vaughn as an elderly and infirm person facing financial dire straits, who entered into a contract to sell her home to Golan Developers, without a lawyer representing her in the transaction. An independent appraised value of the property was $450,000, but Golan Developers purchased the property from the unrepresented, elderly and infirm person for $250,000. Further, Golan Developers paid only $10,000 to Vaughn at the closing and retained the balance of the purchase price, allegedly at Vaughn's request pending resolution of unrelated family issues. Golan Developers also agreed to pay the then-outstanding balance on Vaughn's mortgage, but failed to do so resulting in a foreclosure proceeding filed against her. The *Vaughn* Court held that while it was clear that Golan Developers took advantage of an elderly and vulnerable person, it could not find clear and convincing proof that Golan Developers committed fraud in the transaction. The Court did find, however, that Samiel Hanasab and Yuval Golan, as principals of Golan Developers, converted the real property for their own use without properly compensating Vaughn and breached their obligation to timely satisfy the underlying mortgage. *Matter of Vita Vaughn*, 26 Misc. 3d 1211(A), 906 N.Y.S.2d 778, 2010 NY Slip Op 50052(U) (Sup. Ct., Richmond Cty., Jan. 6, 2010), reversed on other grounds, *Matter of Vita V. (Cara B.)*, 100 AD3d 913, 954 N.Y.S.2d 582 (2d Dep't 2012).

Defendants also submit a copy of a news article reporting that a blind, wheelchair-bound 82- year-old woman claimed that her son sold her home, worth $650,000, to Yuval Golan for consideration of only $6,000, paid to her son. The article further states that the property was fraudulently transferred by deed; that there was no contract or closing statement memorializing the sale; that Golan filed false documents with the City of New York claiming that the property was purchased for $120,000; and that Golan failed to pay off the mortgage on the home. The Supreme Court, Kings County records indicate that after a trial, judgment was entered in favor of the homeowner and the deed was voided. (*Popalardo v. Bapaz Aderet Properties Corp., et al.*, Index No. 10453/2010).

These allegations, in light of the highly questionable deal allegedly made by McKenzie at plaintiff's behest, raise serious concerns. However, in light of the legal conclusions made herein, the allegations are irrelevant to the ultimate conclusion reached by the court.

[4] Defendants do not specify under which provision of the CPLR they move for such relief. However, since defendants asserted counterclaims against plaintiff, the court will assume that defendants are moving, pursuant to CPLR 3212, for summary judgment on their counterclaims, which allege that McKenzie lacked legal title to convey her interest in the real property at the time and that she

defendants' motion are, *inter alia*, that (a) McKenzie lacked legal capacity to convey her interest in the real property since the Will had yet to be probated and an executor yet to be appointed; [*10] (b) McKenzie lacked mental capacity to convey her interest in the real property due to her addictions and poor health; (c) the authority to sell the real property rested solely with the executor pursuant to the Will and by law; (d) there was no contract of sale detailing the terms and conditions of the [**5] transaction, including the sales price, as required by General Obligations Law 5-703(2); (e) McKenzie was unrepresented by counsel, indicating that the transaction was not at arms length; and (f) Yuval Golan, the principal of the plaintiff corporation, has a history of perpetrating fraud and using predatory tactics against vulnerable homeowners and heirs of estates.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff cross-moves for summary judgment, pursuant to RPAPL 1515, for an order (a) determining the interests of the plaintiff and defendants in the real property; (b) for partition and sale; and (c) cancelling and discharging a mortgage in the sum of $15,000 against Lincoln Savings Bank.[5] Plaintiff argues that by operation of law, title to real property devised under a will vests in the beneficiary at the moment of the testator's death, and regardless of a will's direction giving the executor the power to sell, title [*11] to real property does not rest with the executor. Therefore, plaintiff argues, it obtained legal and valid title to McKenzie's one-third share in the real property, despite the fact that the Will had yet to be probated and an executor yet to be appointed at the time of McKenzie's alleged conveyance of her interest in the real property.

SUMMARY JUDGMENT STANDARDS

Summary judgment is a drastic remedy that may be granted only where there is an absence of any material issues of fact requiring a trial. *See* CPLR § 3212(b); *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 (2012). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). Failure to make this initial showing requires a denial of the motion, "regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). In reviewing the sufficiency of the proponent's submissions, the facts must be carefully viewed "in the light most favorable to the non-moving party." *Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 339, 960 N.E.2d 948, 937 N.Y.S.2d 157 (2011). The court's function in deciding a summary judgment motion is issue finding rather than issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

DISCUSSION

Courts have held that "title to real property devised under the will of a decedent vests [*12] in the beneficiary at the moment of the testator's death." *Matter of Seviroli*, 31 AD3d 452, 454-455, 818 N.Y.S.2d 249 (2d Dep't 2006); *Matter of Katz*, 55 AD3d 836, 836, 869 N.Y.S.2d 542 (2d Dep't 2008); *Waxson Realty Corp. v. Rothschild*, 255 NY 332, 336-337, 174 N.E. 700 (1931). Further, an executor's "power to sell the property, without the existence of a valid trust over the proceeds, vests no title in the executor." *Matter of Seviroli*, 31 AD3d at 454-455. Plaintiff contends that these axioms stand for the proposition that a beneficiary to a will, having title to an estate's real property at the moment of the testator's death, has legal authority

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lacked mental capacity to enter into the agreement.

[5] This action's procedural history, while pending in Supreme Court, was rather complicated and detailed recitation herein is unnecessary. Suffice it to say that a number of banks and creditors, purportedly parties who may have an interest in the estate, were named as defendants. However, no defendants, other than Okon and Applebaum, remain in the action.

to convey his or her share of real property by deed at any time, even before the will is probated and an executor is appointed. That contention is overly simplistic and does not comport with the universe of caselaw and statutes that apply to the facts at issue, nor [**6] with the testator's intent herein. Moreover, the argument is at odds with the fundamental necessity of allowing an executor to exercise her/his fiduciary duties and powers over the estate without impediment, for the purposes of fostering the orderly administration of estates. Accordingly, for the reasons discussed below, this court finds that McKenzie did not have the legal authority to convey her share in the real property by deed at the time when she allegedly did so.

While it is true that title to an estate's real property [*13] vests in beneficiaries at the moment of a testator's death, their title is qualified and subject to the executor's power to sell the property to satisfy the debts and obligations of the estate. *Matter of Ballesteros*, 20 AD3d 414, 415, 798 N.Y.S.2d 131 (2d Dep't 2005); *Matter of Katz*, 55 AD3d 836, 836, 869 N.Y.S.2d 542 (2 Dep't 2008). Accordingly, "title does not fully vest in the legatee until a fiduciary gives an assent to its release." *Estate of Coe Kerr, Jr.*, NYLJ Mar. 16, 1983, at 6, col. 3 (Sur. Ct. NY County 1983); *see also Estate of Edwards*, NYLJ Feb. 18, 2000, at 30, col. 2 (Sur. Ct. Kings County 2000) ("Even where a real property is specifically devised, title to the property remains in the decedent's name and remains an estate asset available for the payment of administration expenses and taxes, until the fiduciary gives assent to its release.") Further, property in an estate "is always, by definition, held in the testator's name at the time of death (else the testator would not be able to bequeath or devise it)." *Estate of Mendelson*, 2017 N.Y. Misc. LEXIS 2685, NYLJ July 19, 2017, at 27, col. 3 (Sur. Ct., NY Cty. 2017). "Accordingly, an executor must always take at least some action with respect to such property, even if only to cooperate in its record transfer." *Id.* "Moreover, an executor is often as a practical matter [*14] called upon to perform various functions with respect to the property prior to its transfer, at whatever point the transfer may occur." *Id.* As the *Mendelson* Court wisely further explained:

> "The decisions commonly say that title to specifically bequeathed or devised property passes automatically to the beneficiary or devisee. However, these decisions cannot be taken to mean that literally, since it is an incontrovertible fact that, where property is subject of formal title, the executor is unavoidably going to have to be involved in formal transfer of title to the beneficiary. What the decisions mean in this respect is that beneficial entitlement passes automatically to specific beneficiaries or specific devisees, with only a 'qualified legal title' passing to the fiduciaries... to enable them to deal with the property to the extent that they, as fiduciaries, must do so either: (a) to protect the estate as a whole (as opposed to protecting the specific property), when circumstances require, or (b) to satisfy a duty imposed on the fiduciaries by the terms of the will regarding the particular property." *Estate of Mendelson*, 2017 N.Y. Misc. LEXIS 2685, *11, NYLJ July 19, 2017, at 27, col. 3, fn. 4 (Sur. Ct., NY County 2017) [*15]

There is an indispensable reason why testators nominate fiduciaries and the Surrogate's Courts appoint fiduciaries who duly qualify under the law to administer estates. A competent person must be designated to execute the important duties of carrying out the testator's wishes, protecting the estate's assets, and satisfying the estate's debts and obligations. Further, a capable person must be chosen to exercise the powers that a fiduciary has under the law and as may be provided in the will. These principles are at the root of why laws and procedures were enacted to foster the orderly and equitable administration of estate. Accordingly, the law requires that a fiduciary be allowed the opportunity to first, be appointed, and to then marshal the assets of the estate, pay its debts and obligations, distribute the proceeds of the estates,

and, in the case of real [**7] property, to sell under terms that the fiduciary deems most advisable.[6]

Here, McKenzie's alleged conveyance by deed, of a partial interest in the estate's real property, even before the Will was probated and the executor appointed, was premature and without legal authority. A fiduciary's powers over an estate's real property [*16] are comprehensive and include the authority to sell the property "at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein;" to mortgage the property; to lease the property for a term not exceeding three years; to make ordinary repairs; and to grant options for the sale of the property for a period not exceeding six months. EPTL 11-1.1(b). Pursuant to the broad powers granted to a fiduciary by law, Okon, as executor, must have been given an opportunity to decide what actions to take with respect to the real property, whether it was to sell it to satisfy the estate's debts and obligations, or to sell under terms that he determines is most advantageous to the estate and its beneficiaries.

Moreover, the alleged transaction between plaintiff and McKenzie was in contravention of the executor's powers under the decedent's Will, which are even greater than the executor's powers under the law. The decedent's Will granted the executor "the fullest power and authority in all matters and questions, and to do all acts which [the decedent] might or could do if living, including without limitation, complete power and authority to retain [*17] any and all property, whether real, personal or mixed, and to sell, mortgage, lease, dispose of and distribute in kind, any and all said property, at such times and upon such terms and conditions as [the executor] may deem advisable." Here, the decedent's clear intent was to grant the executor exclusive powers to make any decisions with respect to the real property, including when and whether to partition or sell it. It is axiomatic that the testator's intent, as expressed in a will, is paramount and must be the "absolute guide" in deciding disputes over a testate estate. *In re Bieley*, 91 NY2d 520, 525, 695 N.E.2d 1119, 673 N.Y.S.2d 38 (1998). Therefore, McKenzie was without legal authority to convey by deed her beneficial entitlement to a one-third share in the real property before Okon was appointed and given an opportunity to exercise his exclusive powers over the property.

This is the only conclusion that logically flows from these facts when considered in light of the law, and the practicalities and logistics of administering an estate, whether title to estate property vests in the beneficiaries at the moment of death or not. To allow one or more beneficiaries to unilaterally convey their beneficial interest in real property, before an executor has [*18] had the opportunity to exercise his fiduciary duties and powers over the property, would frustrate the purpose of the laws designed to foster the orderly administration of estates. Indeed, this matter is an extreme example of how an executor could be impeded in his duties and powers to the detriment of the estate, if individual beneficiaries are allowed to act unilaterally in disposing of real property. Here, even before the Will was probated, plaintiff filed a partition [**8] action, tying up the estate in litigation and holding the disposition of the real property hostage.[7] The premature conveyance by deed,[8] allegedly made between plaintiff and McKenzie, wrongfully usurped the powers of the executor and thwarted the intent of the testator, all to the detriment of the estate and its surviving

[6] A fiduciary has the power to sell real property without judicial authority, unless the real property was specifically devised in a will, which is not the case here. EPTL 11-1.1(b). In the case of specifically devised real property, a fiduciary is required to seek judicial authority under Article 19 of SCPA.

[7] The court notes that an order of partition and sale, the relief sought by plaintiff, may have resulted in a loss to the estate, in comparison to the executor selling the property under terms and at a time when he deems it most advantageous to do so.

[8] The conveyance of McKenzie's interest for $10,000, in light of the property value, might rise to unconscionable conduct as a matter of law. However, the court need not determine this issue in view of its finding.

beneficiaries. This type of forced self-help partition of an estate's real property, commenced two months after the purported transfer and three months prior to admission of the Will to probate, has no support in law and cannot be countenanced.

The court is cognizant that "[a] person entitled to share in an estate may assign or grant his interest in the estate, and the assignee becomes a person interested [*19] in the estate." 6 Warren's Heaton on Surrogate's Court Practice 75.02 (2018). An assignment of interest in an estate must be in writing and recorded in the county clerk's office of the county where the estate's real property is situated, or in the case of personal property, in the Surrogate's Court. EPTL 13-2.2. Further, an assignment may not be recorded "unless accompanied by an affidavit in a form satisfactory to the court, which shall state whether any power of attorney or separate agreement exists which relates to such assignment or which fixes presently or prospectively the amount payable by or to the assignor." 22 NYCRR 207.47. Where such a power of attorney or separate agreement exists, it must be attached to the affidavit. *Id.* None of these procedures were followed in the transaction between plaintiff and McKenzie. Had a valid assignment of McKenzie's beneficial share in the estate been made and recorded, plaintiff might have a claim against the estate which could be raised at the time of the estate's accounting.

Lastly, that part of defendants' motion, asserting that the deed should be rescinded on the grounds that plaintiff engaged in fraudulent conduct and that the transaction was otherwise unconscionable, is denied as moot and without prejudice. [*20] The alleged conveyance of a one-third interest in a parcel of real property in Brooklyn valued at $1.8 million, by an unrepresented seller in exchange for the paltry sum of $10,000, strikes the court as subject to a claim of unconscionable conduct as a matter of law. However, the court need not rule on these issues given the outcome.[9]

CONCLUSION

For the foregoing reasons, defendants' motion is granted and plaintiff's cross-motion is denied. The deed dated August 17, 2011 and recorded on September 29, 2011, purporting to convey Pamela McKenzie's one-third interest in the real property located at 258 Fenimore Street, Brooklyn, NY to plaintiff is void, rescinded and cancelled. It is further ordered that plaintiff shall have no claim to the real property located at 258 Fenimore Street, Brooklyn, NY and is forever barred from asserting any interest, claim, or ownership over the real property located at 258 Fenimore Street, Brooklyn, NY. All other arguments have been considered and found unavailing or otherwise moot.

Settle decree.

Dated: May, 2018

Brooklyn, New York

HON. MARGARITA LÓPEZ TORRES

Surrogate

End of Document

[9] Since defendants' motion is granted and the deed is rescinded, plaintiff's motion for a partition and sale is rendered moot. However, the Court notes that even if defendants' motion were denied, plaintiff's motion would also be denied. Plaintiff has failed to establish that a partition and sale is either necessary or in the best interests of the estate at this juncture; or that the executor's broad authority to administer a decedent's real property requires judicial intervention at this time. *See* EPTL 11-1.1[b][5]; *Arata v. Behling*, 57 AD3d 925, 926, 870 N.Y.S.2d 450, (2d Dep't 2008) (the remedy of partition and sale "is always subject to the equities between the parties" and summary judgment may be denied where triable issues are raised).

In re Estate of Driver

Surrogate's Court of New York, New York County

April 2, 1974

No Number in Original

Reporter
77 Misc. 2d 664 *; 354 N.Y.S.2d 381 **; 1974 N.Y. Misc. LEXIS 1212 ***

In the Matter of the Estate of George Driver, Deceased

Case Summary

Procedural Posture
A trustee and the beneficiaries of a New York decedent's estate raised objections to the request by the decedent's executors, in an accounting proceeding, for the allowance of commissions to them for performing services in managing the decedent's unsold real property.

Overview
The decedent had left his residuary estate, which included all his real property and certain of his personalty, in trust. The real property had not been sold. The executors had hired an agent to manage the real property. On consideration of the objections, the court held that the executors were not entitled to receive commissions because they had not actively managed the real property themselves. The court noted that the executors had chosen instead to employ an agent for that purpose. The court also noted that the general rule was that when real estate vests pursuant to a will and the executorial power of sale has expired, the executors are not entitled to commissions. The court distinguished the case cited by the executors in support of their position by noting that here the executors simply permitted the property to vest in the trust pursuant to the will. Thus, the court concluded, the executors had not received, distributed, or delivered the real property, within the meaning of N.Y. S. Civ. Prac. Act § 2307(2), to justify the allowance of commissions.

Outcome
The court allowed the objections made by the trustee and the beneficiaries to the executors' request for the allowance of commissions on the unsold real property and held that the account should be amended accordingly.

Counsel: *Weisman & Weisman* for George Greenberg and another, as executors.

Burns, Kennedy, Schilling & O'Shea (*Henry J. Kennedy* and *Edmund J. Burns* of counsel), for Columbia University, as trustee and [***2] remainderman, and another.

Louis J. Lefkowitz, Attorney-General (*Irwin M. Strum* of counsel), for ultimate charitable beneficiaries.

Judges: S. Samuel Di Falco, S.

Opinion by: DI FALCO

Opinion

[*664] [**382] In this accounting proceeding objections have been raised concerning the request by two of the executors for the allowance of commissions on unsold real property.

Decedent, after making bequests of $ 1,000 to

charity and all of his personal property and shares in a co-operative apartment to his wife, left his residuary estate including all his real property and the remainder of his personal property in trust. The real property has not been sold. The request by the executors for an allowance of commissions upon the real property is based solely upon their contention that they have performed services in managing this property. This, however, is not the criteria for an allowance of commissions.

It is a well-established rule that when real property vests pursuant to the terms of a will and the executorial power of sale expires, the executors are not entitled to commissions. (*Matter of Tucker,* 75 Misc 2d 318; *Matter of Saphir,* 73 Misc 2d 907; *Matter of Lanzner* [***3] , N. Y. L. J., Dec. 7, 1972, p. 15, col. 8.) In such cases no commission is allowable since the executor has not received or distributed the property. (*Matter of Salomon,* 252 N. Y. 381.)

The executors contend that this case comes within the exception to the general rule and rely upon this court's holding [*665] in *Matter of Tucker* (*supra*) to support their position. The court is of the opinion that the reliance on *Matter of Tucker* is misplaced. In *Tucker* the realty passed under the residuary clause of the will which directed division in two equal parts. The will directed that all estate taxes be paid out of the second part of the residuary estate. It was this allocation which resulted in trusts of unequal size. The gross estate was valued at slightly over $ 1,171,000 of which $ 950,000 represented the value of the parcel of realty. The debts and administration expenses, including taxes, were just under $ 250,000. Thus it was obvious that the executors would either have to sell the realty or arrange to divide it between two trusts of unequal size. The executors distributed 64.55% to one trust and 35.45% to the second trust. Each trust principal was [***4] indebted to income for funds borrowed to meet principal obligations for debts and expenses. This court in allowing commissions on real property did not base its decision on the fact that the executors had managed the property but held that the executors were required to take executorial action and to allocate the real property between the two trusts. The executors in that case did not just permit the property to vest in the trustee pursuant to the terms of the will as here but made the determination to distribute the property in kind so that it could be held for its investment value, rather than to sell it and use the proceeds to satisfy the balance of debts, expenses and the funding of the trust.

[**383] This court, in *Tucker,* found that the executors had "received, distributed or delivered" real property within the meaning of subdivision 2 of SCPA 2307. In the instant case no such finding can be made simply upon the fact that the executors performed services in managing the real property. Where an executor is entitled to or required to collect rents, hold and manage real property, he is compensated by way of commissions on gross rents plus he is entitled to management [***5] fees of 5% of the gross rents collected, provided he does actively manage the property. (*Matter of Marshall,* 11 N Y 2d 955; *Matter of Burrows,* 3 N Y 2d 869; *Matter of Saphir,* 73 Misc 2d 907, *supra*.)

While the executors herein do not claim management fees since they employed an agent, it is clear that they themselves made this choice. The objections to the allowance of commissions on real property are allowed and the account shall be amended.

Estate of Taylor

Surrogate's Court of New York, Kings County

February 2, 2005

4845-01

Reporter
2005 N.Y. Misc. LEXIS 3263 *; 233 N.Y.L.J. 22

Estate of Edith Taylor

Case Summary

Procedural Posture
Petitioner, a decedent's administrator who was a son of the decedent, filed an action against respondent, a grandson of the decedent, to eject respondent from the decedent's home.

Overview
The one-family home was the only asset of the estate. The decedent, who died intestate, was survived by three children. Respondent was the son of the third child, who died after the decedent. Respondent refused to move out of the property or to take his belongings out of the property. The court stated that under SCPA 1902 and EPTL 11-1.1, a fiduciary had the right to possess and manage a decedent's realty so that he could sell the property to make it productive to all those with a beneficial interest therein. When an occupant of property was a distributee having a present interest in the estate, an ejectment action was warranted to carry out the disposition of real property under SCPA 1902. Respondent's continued occupation of the property here, to the exclusion of all other distributees, prevented petitioner from selling the estate's primary asset, to the estate's detriment. It was clear that it was in the best interest of all the distributees that the premises be sold as expeditiously as possible because no meaningful distribution could be made to any of them until the premises were sold. Accordingly, ejectment was warranted.

Outcome
The court ordered the ejectment of respondent.

Judges: [*1] Surrogate Feinberg

Opinion by: Feinberg

Opinion

Andrew Taylor is the decedent's son and administrator of her estate. He brought this miscellaneous proceeding, by order to show cause, to eject his nephew, Michael Taylor, from decedent's home located at 309 Bainbridge Street, Brooklyn, New York.

The decedent, Edith Taylor, died in 1980, and at the time of her death was domiciled at the subject premises. The property is the only asset of the estate. The decedent was survived by three children, Andrew Taylor, Lydia Ann Taylor and Loretta R. Taylor, as her sole distributees. Michael Taylor is the grandson of the deceased, the son and sole distributee of Loretta R. Taylor, who post-deceased Edith Taylor on or about July 12, 2000.

This case has a lengthy procedural history. Michael Taylor, the son of a post-deceased distributee, brought an action pursuant to SCPA § 711 to revoke the Letters of Administration issued to Andrew Taylor, stating that Andrew Taylor wilfully ignored his interest as a distributee in the property. Andrew Taylor moved pursuant to CPLR § 3211 to dismiss the petition for revocation which

was granted. The petition to revoke the letters [*2] of administration was denied for failure to state any specific grounds sufficient to warrant the revocation.

On June 14, 2002, Michael Taylor, individually, and as Administrator of the Estate of Loretta Taylor, his mother, executed and recorded a deed conveying the property belonging to Edith Taylor, his grandmother, to himself. Thereafter, the Estate of Edith Taylor brought a petition on October 17, 2002, to set aside that deed claiming that the Estate of Loretta R. Taylor did not have legal title to the property and at most had a one third interest in the property. On May 8, 2003, respondent, Michael Taylor, admitted service and accepted jurisdiction which was placed on the record.

After a conference with the court, on May 22, 2003, Michael Taylor, entered in a stipulation to nullify said deed and consented to return the property to the Estate of Edith Taylor. On May 23, 2003, the court rendered a decision stating that the property shall remain the property of the Estate of Edith Taylor.

Michael Taylor has been residing in the property with his mother, Loretta R. Taylor, until her demise on July 12, 2000. Subsequent to her death, an administrator of Edith Taylor's estate was appointed [*3] to sell the house and distribute the proceeds to the distributees. After the court nullified the deed transferred by Michael D. Taylor, as administrator of the Estate of Loretta Taylor, grantor, to Michael D. Taylor, as grantee, and returned the property to the Estate of Edith Taylor, Michael Taylor, was then made an offer by the administrator to allow him to purchase the premises from the estate. The estate offered to sell the premises to the respondent for a price which was less than fair market value since he is presently occupying the premises and moreover, the estate would not have to pay a real estate commission. However, despite numerous conferences with the court and lengthy negotiations, no agreement was reached.

On December 31, 2003, petitioner brought an order to show cause for an order of ejectment. Petitioner's attorney submitted an affidavit stating that despite repeated requests to resolve this matter, the respondent indicated that he will not move out of the property or remove his belongings from the property. He stated that an order of ejectment is required in order that the beneficiaries of the estate receive their interests from the sale of the estate's sole asset.

[*4] On the return date of the motion, January 22, 2004, the case was adjourned until January 30, 2004 for petitioner to obtain a supplemental order to show cause as he was unable to obtain jurisdiction over the respondent.

Thereafter on March 4, 2004, the respondent appeared in court and denied service upon him. Michael Taylor testified that he was not served in any manner with regard to the proceedings in this court. Specifically, he stated that he was not served with the Order To Show Cause with the Petition for Ejectment nor with the Supplemental Order To Show Cause with the Petition for Ejectment.

A traverse hearing was held on March 23, 2004, and in a decision dated April 14, 2004, this court held that service had been properly effected upon the respondent, Michael D. Taylor and accordingly, the traverse was overruled. Accordingly, the court, in a decision dated April 22, 2004, placed the petition for an order of ejectment on the calendar for May 6, 2004 with response papers to be sewed on or before May 3, 2004.

Subsequently, the respondent herein, filed papers in the United States District Court, Southern District, effecting a removal to that court pursuant to the Notice of Filing [*5] of Removal filed on April 30, 2004 and the petitioner timely moved for remand on May 12, 2004.

The United States District Court, Southern District, in a decision dated June 14, 2004, granted petitioner's motion and the matter was remanded back to this court. The Court held that the petition

for ejectment asserted absolutely no claim under federal law, but rather concerned purely state law property issues and thereby respondent failed to carry his burden of establishing that federal jurisdiction existed.

Accordingly, this court, in a decision dated June 20, 2004, placed the petition for an order of ejectment once again on the court calendar for July 22, 2004 with response papers to be served on or before July 20, 2004.

The respondent appeared on July 22, 2004 and maintained that he filed an appeal from the U.S. District Court's Order in this matter and that there was a stay in effect. The court granted him an adjournment to August 10, 2004 to provide the court with a written copy of a stay. If no stay were provided, the case would proceed on that date.

On the adjourned date of August 10, 2004, respondent again maintained that there was a stay in effect. Both sides presented their [*6] arguments in open court and the court advised the respondent that a decision would issue unless he produced a stay from any court or any agency or notified either the judge or court attorney that a stay was being contemplated by any court or agency. None was produced to date.

Warren Weed's New York Real Property defines ejectment as an action at law to restore possession of real property to the party rightfully entitled to it. Where a party having a right of possession in real property is excluded from it, an action to recover real property enables enforcement of a right of entry against the defendant who is wrongfully denying possession.

This court has jurisdiction over such matters where it involves the affairs of the decedent and the ejectment or eviction is part of the process of administering the estate, (Matter of Piccione, 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669; Estate of Felicia de Marinis, NYLJ, Sept. 1, 1999, at 31, col 1; Estate of Nanita Grace Abrams v Tammy Leigh Callagy, NYLJ, Sept 25, 1996, at 26, (col 2);).

A fiduciary has a right to possess and manage the decedent's realty so that he may sell the property in accordance with the statutory authority with which estate fiduciaries [*7] are imbued, as well as to collect the rentals thereof, and otherwise preserve the asset and make it productive to all those with a beneficial interest therein (SCPA § 1902; EPTL § 11-1.1; Estate of Pastorelli, NYLJ Nov. 21, 2002 at 25, col 5; Estate of Semenza, NYLJ, Sept. 15, 2000, at 28, (col. 2)).

"While it is true that legal title in real property vests in the statutory distributees upon the intestate death of the owner, their rights are subject to the rights granted the administrator of taking immediate possession and collecting the rentals thereof, in order to preserve the asset and make it productive to those with a beneficial interest therein" (Estate of Grad, NYLJ, Mar. 29, 2002, at 26, col 6). Realty descends at death to the distributees, subject to the right of the administrator to manage it, and to sell it for the purposes of distribution, (Estate of Burstein, 153 Misc. 515, 275 N.Y.S. 601). A fiduciary may request the Surrogate for permission to bring a partition action pursuant to SCPA § 1901, when the estate of a decedent is the owner of an estate in common in real property, however, when the occupant is a distributee living [*8] in the premises having a present interest in the estate, an ejectment action is warranted to carry out the disposition of real property pursuant to SCPA § 1902.

It is undisputable that the respondent has had sole use and occupancy of the subject premises, a one family house, since the death of the decedent rent free. His continued occupation, to the exclusion of all other distributees, prevents petitioner from selling the estate's primary asset to the estate's detriment, (Estate of Rose Santillo, NYLJ, Nov. 26, 2003, at 37, col 3; Estate of McDonald, 114 Misc. 2d 182, 451 N.Y.S.2d 374).

It is clear that it is in the best interest of all the distributees that the premises be sold a expeditiously as possible because no meaningful

distribution can be made to any of them until the premises are sold, (Estate of Dinapoli, NYLJ, Feb. 22, 1994, at 30, col 4; 29 NY Jur 2d Courts and Judges § 771; 14 West's McKinney's Forms, ESP, § 2:02).

Accordingly, the motion for the relief requested by petitioner for an order of ejectment is granted.

It is further ordered that Andrew Taylor, as administrator of the Estate of Edith Taylor, the petitioner, recover of Michael D. Taylor, [*9] respondent, the possession of the premises as prayed for in the petition herein.

The clerk of the court is directed to mail a copy of this decision and order to all parties.

A copy of this order shall be transcribed and docketed in the County Clerk's office and the sheriff shall execute upon the transcribing and docketing of this order.

After the transcribing and docketing this order, the sheriff of the County of Kings, at a date no earlier than March 8, 2005, be and is hereby required, immediately upon receipt of a certified copy of this Order and transcript, to enter upon the premises hereinafter described and eject therefrom Michael D. Taylor and every person holding the same or any part thereof under him adversely to the Estate of Edith Taylor and to put Andrew Taylor, the administrator of the Estate of Edith Taylor, into possession of said premises, and that this Order be executed by said sheriff as if it were an execution for the delivery of the possession of said premises.

The said premises are described as follows:

309 Bainbridge Street, Brooklyn, New York, 11233.

This constitutes the decision and order of the court.

In re Gunst

Surrogate's Court of New York, Suffolk County

April 10, 2012, Published

No Number in Original

Reporter
2012 NYLJ LEXIS 823 *

ACCOUNTING BY LAWRENCE GUNST AS THE EXECUTOR OF THE ESTATE OF ETHEL GUNST, Deceased

(ACCOUNTING BY LAWRENCE GUNST AS THE EXECUTOR OF THE ESTATE OF ETHEL GUNST, Deceased, NYLJ, Apr. 10, 2012 at p.31, col.3)

Judges: [*1] Surrogate Czygier, Jr.

Opinion

ACCOUNTING BY LAWRENCE GUNST AS THE EXECUTOR OF THE ESTATE OF ETHEL GUNST, Deceased

ACCOUNTING BY LAWRENCE GUNST AS THE EXECUTOR OF THE ESTATE OF ETHEL GUNST, Deceased-In this final accounting proceeding, covering the period July 23, 2004, through November 12, 2010, petitioner is the successor executor of the estate, letters testamentary having issued to him on November 20, 2007. Petitioner seeks a decree (a) judicially settling his account; (b) approving the payment of commissions to him in the amount of $14,702.20; (c) approving legal fees in the amount of $26,345.00 and disbursements in the amount of $2,225.98, of which $17,010.39 have already been paid; (d) approving the anticipated legal fee in the amount of $10,000.00 for those services rendered prior to entry of a final decree, allowing for a refund of any balance; (e) charging $90,000.00 to the share of Wayne Gunst for rent for the period from June 2006 to February 2010; (f) charging $28,570.98 to the share of Wayne Gunst for legal fees incurred in removing him as executor and ejecting him from the real property belonging to the estate as well as $2,500 for legal fees incurred by Wayne Gunst in the defense [*2] of his removal; (g) charging $78,000.00 to the share of Wayne Gunst for the "loss of the benefit of the bargain" on the sale of real property; (h) charging $5,469.47 to the share of Wayne Gunst for the cost of homeowner's insurance; (i) denying Wayne Gunst any commissions for his tenure as executor; (j) distributing the estate, after the application to the share of Lawrence Gunst of charges assessed to Wayne Gunst, to Wayne Gunst and Lawrence Gunst in equal shares.

Jurisdiction has been obtained over all persons listed in the petition as necessary parties and no one has appeared in opposition to any of the requested relief. Given the nature of the relief requested, an inquest was held so that petitioner could make a prima facie showing of his entitlement to the damages requested. Although the beneficiary, Wayne Gunst ("Wayne"), has been served with process in the accounting proceeding and notice of the inquest, he has not filed a responsive pleading or otherwise appear in this matter.

Pursuant to the statement of issues filed in connection with the inquest, the issues to be determined were the following: 1) petitioner's

entitlement to legal fees; 2) his entitlement to rent in the amount [*3] of $90,000, charged against Wayne; 3) should Wayne be denied commissions for his tenure as executor. Petitioner had also originally sought to charge Wayne for homeowner's insurance and $78,000.00 for the "loss of the benefit of the bargain," but withdrew these requests on the record.

The record reflects that decedent died testate on July 28, 2004, survived by two sons. Decedent's will was admitted to probate on September 9, 2004 and letters testamentary were issued to Wayne thereunder. Under the terms of the will, decedent left the residue of her estate to her two sons in equal shares. Thereafter, petitioner filed proceedings seeking an accounting, removal of Wayne as fiduciary, and appointment as successor fiduciary. On January 30, 2006 an order was filed directing Wayne to file an accounting. Upon Wayne's default, Wayne was removed as fiduciary and successor letters testamentary were issued to petitioner on November 20, 2007. The instant accounting indicates that the primary asset of decedent's estate was a single family home. On June 15, 2009 this court issued an order of ejectment to remove Wayne from the real property.

Discussion

Petitioner now seeks to charge his brother's share [*4] of the estate rents for the time period for which he was living in the property. While Wayne, as one of two residuary beneficiaries of decedent's estate was vested with title upon the admission of the will to probate as a tenant in common with petitioner (Trask v. Sturges, 170 NY 482, 63 N.E. 534), and therefore entitled to the right of possession of the property, (Matter of Spiss' Estate, 50 Misc 2d 595, 271 N.Y.S.2d 11), when such possession is to the exclusion of the other tenant in common, rent shall accrue (Matter of Spiss' Estate, supra). The proof submitted to the court demonstrates that Wayne lived in decedent's residence from the time of decedent's death until he was ejected. Wayne served as the fiduciary of the estate from September 9, 2004 to November 20, 2007. On November 5, 2008, after his appointment as fiduciary of the estate, petitioner filed a petition to eject his brother from the residence and the proof establishes that Wayne finally vacated the house in February of 2010. Petitioner submitted proof at the inquiry to establish that a reasonable monthly rent for this time period is $2,175.00.

Petitioner's request to charge to his brother's share of the estate fair market rental for the property is granted, but modified to the extent that respondent is entitled to half of the reasonable rents [*5] for the thirty-nine month period from September 2004 to November 2007 ($42,412.50), and additionally to half of the reasonable rents for the sixteen month period from November 2008 to February 2010 ($17,400.00). As Wayne was fiduciary of the estate, it was his duty to collect rents on behalf of the estate, which he failed to do in favor of his remaining in the home for the time period of September 2004 to November 2007. In addition, the initiation of an ejectment proceeding by petitioner in November of 2008 is clear evidence that Wayne remained in the house to the exclusion of petitioner (Matter of Spiss' Estate, supra). Any rental income, however would be split equally between the brothers, which therefore entitles petitioner to charge his brother's share the sum of $59,812.50.

Petitioner seeks the court's approval of legal fees in the amount of $26,345.00, plus disbursements in the amount of $2,225.98. Counsel's affirmation of services indicates that his office has spent almost one hundred and seventeen hours in legal services rendered to this estate. When evaluating legal fees, the court must bear in mind that the fee sought must also bear a reasonable relationship to the size of the estate involved and must [*6] be proportional to the benefit received by the estate (Estate of Kaplan, 5/15/2000 NYLJ 32, (col. 6); citing Matter of Kaufman, 26 AD2d 818, 273 N.Y.S.2d 902, aff'd, 23 NY2d 700, 243 N.E.2d 751, 296 N.Y.S.2d 146; Matter of McCranor, 176 AD2d 1026, 575 N.Y.S.2d 181). After careful evaluation of the

nature, extent, and details of the services performed by counsel for petitioner (Matter of Freeman, 34 NY2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336, Matter of Potts, 123 Misc. 346, 205 N.Y.S. 797, aff'd. 213 AD 59, 209 N.Y.S. 655, aff'd. 241 NY 593, 150 N.E. 568), after careful evaluation of the nature, extent, and details of the services performed by counsel, the court fixes and approves petitioner's attorney's fees in the amount requested. Petitioner also seeks to charge the entirety of the legal fees incurred to Wayne's share, asserting that such fees were incurred to Marshall an asset of the estate and bring a benefit thereto. To the extent that petitioner's efforts did bring a benefit to the estate, the court grants the petition, however, the amount to be charged specifically to Wayne's share shall be $8,000 (Matter of Hyde, 15 NY3d 179, 933 N.E.2d 194, 906 N.Y.S.2d 796).

Petitioner also seeks the court's approval for the payment of $10,000.00 in anticipated legal fees, such amount being subject to reimbursement if unused. The court, however, does not under these circumstances approve legal fees for services that have not yet been rendered. Any application for approval of additional legal fees, however, may be considered upon the submission of a supplemental affidavit [*7] of legal services on notice along with the decree to be entered herein. All other incidental relief is granted.

Submit decree.

New York Law Journal

Matter of Hyde

Court of Appeals of New York

June 29, 2010, Decided

No. 130

Reporter
15 N.Y.3d 179 *; 933 N.E.2d 194 **; 906 N.Y.S.2d 796 ***; 2010 N.Y. LEXIS 1341 ****; 2010 NY Slip Op 5676

[1] In the Matter of a Trust Created by Charlotte P. Hyde, Deceased. Glens Falls National Bank and Trust Company et al., as Trustees of a Trust Created by Charlotte P. Hyde, Deceased, Respondents; Carol J. Whitney, as Executor of Louis H. Whitney, Deceased, et al., Respondents, and Mary W. Renz et al., Appellants. (And Another Proceeding.)

Subsequent History: On remand at, Costs and fees proceeding at Matter of Hyde, 2011 N.Y. Misc. LEXIS 2613 (N.Y. Sur. Ct., May 20, 2011)

Prior History: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 2, 2009. The Appellate Division affirmed (1) an amended order of the Surrogate's Court, Warren County (John S. Hall, Jr., J.), which had denied a cross motion by respondents Mary W. Renz, Franklin Todd Renz, Gavin W. Renz and Mary Eliza Pruyn Renz-Utti for reallocation of trustees' counsel fees in proceeding Nos. 1 and 2; (2) a decree of that court which had settled the intermediate account of the trust in proceeding No. 2; and (3) a decree of that court which had settled the intermediate accounts of the trusts in proceeding No. 1.

Matter of Hyde, 61 A.D.3d 1018, 876 N.Y.S.2d 196, 2009 N.Y. App. Div. LEXIS 2479 (N.Y. App. Div. 3d Dep't, 2009)

Disposition: [****1] Order modified, with costs to appellants, by remitting to Surrogate's Court, Warren County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Case Summary

Procedural Posture

Respondent income beneficiaries appealed an order by the Appellate Division (New York) that affirmed a surrogate's order treating two trusts as single entities for purposes of trustee indemnification and ordering the distribution of trustees' counsel fees from the corpus of each trust generally.

Overview

The Court of Appeals found, inter alia, that SCPA 2110(2) placed discretion in the hands of trial courts to allocate expenses when ordering that fiduciaries be indemnified by an estate for attorney's fees. The trial court's discretion extends to the timing and structure of deducting funds against the present and future interests of the beneficiaries. However, the decision in Dillon, in addition to departing from the plain meaning of SCPA 2110(2), did not focus on the considerations of fairness. Accordingly, that decision was reversed. Inasmuch as the surrogate's court never exercised its discretion, the matter would be remitted to allow it the opportunity to do so.

Outcome

The order was modified by remitting the matter to the surrogate's court for de novo consideration of

allocation of the trustees' counsel fees; and, as so modified, the order was affirmed.

Counsel: *Nolan & Heller, LLP,* Albany (David H. Wilder of counsel), for appellants. I. Based on the pro tanto rule and their lack of any interest in the outcome of the Whitneys' surcharge proceedings, the Renzes' respective interests in trust principal should not be required to bear any portion of the litigation expenses incurred in successfully defending the trustees against the Whitney's objections. (*Matter of Garvin,* 256 NY 518, 177 NE 24; *Matter of Ellensohn,* 258 App Div 891, 16 NYS2d 247; *Matter of Stumpp,* 153 Misc 92, 274 NYS 466; *Matter of Harmon,* 5 Misc 2d 308, 164 NYS2d 468; *Matter of Newhoff,* 107 AD2d 417, 486 NYS2d 956; *Matter of Saxton,* 179 Misc 2d 681, 686 NYS2d 573; *Matter of Janes,* 165 Misc 2d 743, 630 NYS2d 472, 223 AD2d 20, 643 NYS2d 972, 90 NY2d 41, 681 NE2d 332, 659 NYS2d 165; *Matter of Penney,* 60 Misc 2d 334, 302 NYS2d 886; *Matter of Urbach,* 252 AD2d 318, 683 NYS2d 631; *Matter of Antoinette Frances G.,* 135 Misc 2d 1034, 517 NYS2d 680.) II. In any event, the doctrine of stare decisis is not absolute, and in this case, compelling circumstances warrant departing from *Matter of Dillon* (28 NY2d 597, 268 NE2d 646, 319 NYS2d 850 [1971]) construction of SCPA 2110. (*Cenven, Inc. v Bethlehem Steel Corp.,* 41 NY2d 842, 362 NE2d 251, 393 NYS2d 700; *Matter of Eckart,* 39 NY2d 493, 348 NE2d 905, 384 NYS2d 429; *People v Hobson,* 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; *Zappone v Home Ins. Co.,* 55 NY2d 131, 432 NE2d 783, 447 NYS2d 911; *Matter of Meyer,* 209 NY 386, 103 NE 713; *Matter of Higby v Mahoney,* 48 NY2d 15, 396 NE2d 183, 421 NYS2d 35; *Matter of Schinasi,* 277 NY 252, 14 NE2d 58; *Matter of Baxter [Gaynor],* 196 AD2d 186, 609 NYS2d 992; *Matter of Burns,* 126 AD2d 809, 510 NYS2d 732; *Matter of Heilbronner,* 39 Misc 2d 912, 242 NYS2d 118.) III. On common-law grounds as well, a non-objecting beneficiary's interest in the trust estate should not be required to bear any portion of the litigation expenses incurred by a trustee in successfully defending himself against an objection where the pro tanto rule applies. (*Matter of Ungrich,* 201 NY 415, 94 NE 999; *Matter of Rose BB.,* 16 AD3d 801, 791 NYS2d 201; *Parker v Rogerson,* 49 AD2d 689, 370 NYS2d 753; *Matter of Campbell,* 138 AD2d 827, 525 NYS2d 745; *Matter of Garvin,* 256 NY 518, 177 NE 24.) IV. Alternatively, the Surrogate has the power in equity to direct that the Whitneys' respective interests in trust principal be charged with all of the litigation expenses incurred in successfully defending the Hyde and Cunningham trustees against the Whitneys' objections.

Judge & Duffy, Glens Falls (H. Wayne Judge and Monica A. Duffy of counsel), for Carol J. Whitney and others, respondents. I. This appeal lacks merit. (*Matter of Urbach,* 252 AD2d 318, 683 NYS2d 631; *Matter of Dillon,* 28 NY2d 597, 268 NE2d 646, 319 NYS2d 850; *Matter of Penney,* 60 Misc 2d 334, 302 NYS2d 886.) II. The estate of Louis H. Whitney is not a proper party to this appeal. III. The relief requested against the Whitney children in the Cunningham trust accounting is also unavailable. IV. The allocation of legal fees and expenses among litigating legatees is a legislative, not a judicial, matter. (*Matter of Povlsen,* 62 Misc 2d 239, 308 NYS2d 168.) V. The facts of this case compel the application of the established law. VI. The Whitney objectants had an affirmative duty to defend the residuum of these trusts under the circumstances presented here and should not, in equity, be penalized for doing so. (*Meinhard v Salmon,* 249 NY 458, 164 NE 545.) VII. The complete record of these proceedings must be "unsealed" and any stay order of final distribution must be vacated.

Putney Twombly Hall & Hirson LLP, New York City (Christopher M. Houlihan of counsel), for Glens Falls National Bank and Trust Company, respondent.

McNamee, Lochner, Titus & Williams, P.C., Albany (G. Kimball Williams of counsel), for

Banknorth, N.A., respondent.

Judges: Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Opinion by: Lippman

Opinion

[***798] [*182] [**196] Chief Judge Lippman.

[1] We hold that Surrogate's Court Procedure Act (SCPA) § 2110 grants the trial [2] court discretion to allocate responsibility for payment of a fiduciary's attorney's fees for which the estate is obligated to pay--either from the estate as a whole or from shares of individual estate beneficiaries. In so doing, we overrule our holding in *Matter of Dillon* (28 NY2d 597, 268 NE2d 646, 319 NYS2d 850 [1971]).

We consequently modify the order of the Appellate Division affirming the order of the Surrogate and remit to the Surrogate's Court for de novo consideration of allocation of the trustees' counsel fees.

I

This dispute developed out of a joint trial concerning intermediate accountings of two trusts. The first proceeding involved a testamentary trust created by Charlotte P. Hyde (Hyde Trust). At the outset of the trust accountings in 2001, Hyde's grandchildren, [****2] Mary Renz and her brother Louis H. Whitney, were the two life income beneficiaries of two equal shares of the Hyde Trust. Mary Renz's three children (Renz Children) and Louis H. Whitney's two children (Whitney Children) each possessed a presumptive one-fifth remainder interest in both the Mary Renz Share and the Louis H. Whitney Share that would vest upon the death of Mary Renz and Louis H. Whitney, respectively. Upon Louis H. Whitney's death in January 2008, [1] the Renz Children and the Whitney Children each received a one-fifth interest in the principal of the Louis H. Whitney Share of the Hyde Trust.

The second proceeding concerned an inter vivos trust created by Nell Pruyn Cunningham (Cunningham Trust). The Cunningham Trust term is measured by the lives of two of [*183] Cunningham's grandnephews. In 2003, when the Cunningham accounting commenced, Mary Renz and Louis H. Whitney were each income beneficiaries and presumptive remaindermen of undivided one-sixth shares of [****3] the Cunningham Trust. The Mary Renz Share and the Louis H. Whitney Share were to pass to their living issue per stirpes upon the death of Mary Renz or Louis H. Whitney. Thus, upon Louis H. Whitney's death, the two Whitney children became the income beneficiaries and presumptive remaindermen of their father's undivided one-sixth share of the Cunningham Trust.

The two proceedings arose out of objections made to the Hyde trustees' accountings by Louis H. Whitney and the Whitney Children (the Whitneys) and objections made to the Cunningham trustees' accountings by Louis H. Whitney (and carried on by the Whitney Children and Louis H. Whitney's executor after his death). The Whitneys sought to deny the Hyde trustees and the Cunningham trustees their commissions and surcharge them on the basis of their alleged failure to diversify the Trusts' assets, among other objections.

[3] Mary Renz and the Renz Children (the Renzes) did not participate in the Whitneys' objections to trustee conduct in either the Hyde or the Cunningham Trust accounting proceedings. Neither did any of the other income beneficiaries or remaindermen of the Cunningham Trust, aside from Louis H. Whitney (and later his executor

[1] Following Louis H. Whitney's death, his widow and executor, respondent Carol J. Whitney, was substituted for him in both proceedings by order entered in April 2008. The Whitney Children were simultaneously joined as respondents in the second proceeding.

[****4] and the Whitney Children), interpose [***799] [**197] objections to the accounting of that Trust.

In advance of the joint trial on the Whitneys' objections, the Renzes filed an acknowledgment, attesting that they were non-objectors; and thus, under the Pro Tanto Rule, [2] they would not be entitled to share in any surcharges that might be imposed on the Hyde or Cunningham trustees. The Renzes simultaneously filed a cross motion seeking to require that all future trustees' counsel fees be deducted exclusively from the objecting beneficiaries' shares of the Hyde Trust and Cunningham Trust assets. The Renzes' cross motion also sought to reserve the right to seek reallocation of and reimbursement of the Hyde Trust for all counsel fees that had already been advanced from the Renzes' interests in the Hyde Trust.

[*184] Surrogate's [****5] Court dismissed all of the Whitneys' objections. As to the question of attorney's fees, the court acknowledged that the Pro Tanto Rule had applied, which meant that the non-objecting beneficiaries had not stood to gain from the success the Whitneys' objections might have had. Yet, the court stated it was constrained by *Dillon* to treat the trusts as single entities for purposes of trustee indemnification. Thus, regardless of potential unfairness to the Renz beneficiaries who abstained from the costly litigation, the Surrogate's Court ordered that the trustees' counsel fees be disbursed from the corpus of each trust generally. As a result, the Renzes' shares of the Hyde and Cunningham Trusts were held responsible for more than $700,000 in attorney's fees incurred by the trustees.

The Appellate Division affirmed, citing the construction of SCPA 2110 articulated in *Dillon* and finding no basis to distinguish this case (61 AD3d 1018, 876 NYS2d 196 [3d Dept 2009]).

II

SCPA 2110 (2) provides: "The court may direct payment [for legal counsel rendered a fiduciary in connection with the performance of his or her fiduciary duties] from the estate generally or from the funds in the hands of the fiduciary belonging [****6] to any legatee, devisee, [4] distributee or person interested." [3]

We first construed SCPA 2110 (2) in our 1971 memorandum decision, *Matter of Dillon* (28 NY2d 597, 268 NE2d 646, 319 NYS2d 850 [1971]). In *Dillon*, a legatee [***800] [**198] under a testator's will that had been admitted to probate challenged probate of a subsequent will that increased the number of legatees who would inherit and thereby reduced the original legatee's portion of the testator's estate. The Surrogate's Court refused to vacate probate and charged the [*185] objecting legatee's share of the estate with the executor's legal fees expended in defending probate of the later will. The legatee then appealed, asserting that legal fees should be allocated to the whole estate generally, not to the legacy of an individual party. Ultimately, this Court held that "SCPA 2110 does

[2] The court-made Pro Tanto Rule dictates that beneficiaries who did not file objections to a fiduciary's conduct are not entitled to share in the surcharge that accrues to the estate or trust when other beneficiaries file successful objections. The rule sought to prevent non-objecting beneficiaries from being rewarded for their quiescence while their co-beneficiaries defended the estate assets (*see Matter of Garvin*, 256 NY 518, 177 NE 24 [1931]).

[3] The present SCPA 2110 was enacted in 1966 as part of a recodification of the Surrogate's Court Act. The original Surrogate's Court Act § 231-a, adopted in 1923, stated in relevant part, "The surrogate may direct payment therefor from the estate generally or from the funds in the hands of the representative belonging to any legatee, devisee, distributee or person interested therein." (L 1923, ch 526.) SCPA 2110, like Surrogate's Court Act § 231-a before it, provides for compensation out of estate funds for a fiduciary that accrues counsel fees in the course of fulfilling its fiduciary duties to the estate. Although the fiduciary conducts the litigation and may have all the hallmarks of a party to a suit (especially when the fiduciary is defending itself in a surcharge proceeding), the estate is ordinarily obligated to indemnify the fiduciary for attorney's and litigation fees (*see e.g. Wetmore v Parker*, 52 NY 450 [1873]; *cf. Matter of Wadsworth*, 275 NY 590, 11 NE2d 769 [1937]). The rationale is that the actions of fiduciaries, absent misconduct, are undertaken to benefit the estate, and the estate should therefore be charged [****7] with the fiduciaries' costs.

not authorize payment for legal services rendered a party to be charged against the share of other individual parties. Accordingly, although appellant lost in this litigation, the legal fees of the executor as her adversary were not chargeable to her personally" (*Dillon*, 28 NY2d at 599).

Although the decision in *Dillon* offers little rationale for its conclusion, the statutory interpretation requiring the corpus of the estate generally, and [****8] not the shares of individual beneficiaries, to pay for fiduciaries' counsel seems guided by the common-law American Rule. In brief, the American Rule requires all parties to a controversy--the victors and the vanquished--to pay their own "incidents of litigation" (*Chapel v Mitchell*, 84 NY2d 345, 349, 642 NE2d 1082, 618 NYS2d 626 [1994], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491, 548 NE2d 903, 549 NYS2d 365 [1989]). Thus, the unsuccessful objectant, under the American Rule, was required to pay only its own attorney's fee, not the executor's attorney's fees as well, which were paid for by the estate.

However, the *Dillon* decision, finding that SCPA 2110 required that the whole of the estate be charged with the executor's counsel fees, in spite of the fact that actions of the [5] objecting party did not effect a benefit to the estate and bordered on the vexatious, seems to have ignored the plain meaning of the statute and departed from the earlier jurisprudence of this Court.

In interpreting SCPA 2110, we bear in mind that it is "presumed that no unjust or unreasonable result was intended and the statute must be construed consonant with that presumption" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 137, 432 NE2d 783, 447 NYS2d 911 [1982], citing *Matter of Breen v New York Fire Dept. Pension Fund*, 299 N.Y. 8, 19, 85 NE2d 161 [1949]and [****9] McKinney's Cons Laws of NY, Book 1, Statutes § 143). The Legislature's intentions should normally be ascertained from a careful reading of the statute itself, especially where, as here, the language is unambiguous, and the legislative history reveals nothing that would counsel an alternative interpretation (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 92 [b]). On its face, the statute provides the trial court with discretion to disburse funds from any beneficiary's share in the estate--and not exclusively from "the estate generally."

[*186] In addition to departing from the plain meaning of the statute, *Dillon* did not focus on the considerations of fairness that guided *Matter of Ungrich* (201 NY 415, 94 NE 999 [1911]) and its progeny (*e.g. Matter of Garvin*, 256 NY 518, 177 NE 24 [1931]; *Matter of Bishop*, 277 App Div 108, 98 NYS2d 69 [1st Dept 1950]; *see also Matter of Burns*, 126 AD2d 809, 510 NYS2d 732 [3d Dept 1987]). In *Ungrich*, the plaintiff, a life tenant under a testamentary trust, brought an action for a trust accounting and to remove the trustees for alleged misconduct. The Surrogate's Court there had dismissed the objectant's challenges. Regarding the question of attorney's fees, we determined as a matter of common law, [**199] prior [****10] [***801] to any statute on the subject, that the court should have discretion to disburse fees from the estate generally or from individual shares, depending on the circumstances of each case. We stated that trustees should have "an opportunity to prove their expenses and the circumstances under which they were incurred," and at that point, "it would be for the court to determine on the facts of the case what part, if any, of such expenditures should be allowed to the [trustees] and charged against the life tenant and what part against the corpus of the estate" (*Ungrich*, 201 NY at 420).

[2] Because we find that this construction is more faithful to the statute, our precedents prior to *Dillon*, and fairness, we choose to restore the plain meaning of SCPA 2110 (2): to place discretion in the hands of the trial courts to allocate expenses when ordering that fiduciaries be indemnified by an estate for attorney's fees. [4] The trial court's

[4] This holding does not involve or affect SCPA 2301 (4), which

discretion extends to the timing and structure of deducting funds against the present and future interests of the beneficiaries.

[****11] **[3]** In cases where a fiduciary is to be granted counsel fees under SCPA 2110 (2), the [6] Surrogate's Court should undertake a multi-factored assessment of the sources from which the fees are to be paid. [5] These factors, none of which should be determinative, may include: (1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual [*187] beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally (*see e.g. Matter of Greatsinger*, 67 NY2d 177, 183-184, 492 NE2d 751, 501 NYS2d 623 [1986] [providing factors to guide courts in discretionary allocation of attorney's fees among multiple trusts in estate litigation]). Inasmuch as Surrogate's Court [****12] never exercised its discretion, we remit to allow it the opportunity to do so.

Accordingly, the order of the Appellate Division should be modified, with costs to appellants, by remitting to Surrogate's Court for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Order modified, etc.

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provides for costs and allowances that may be made payable by any party *personally*.

[5] This holding does not involve or affect the Surrogate's discretion to make the underlying determination of whether or not the fiduciary is entitled to charge its counsel fees to the estate, or whether or not the amount of counsel fees is reasonable. In assessing the reasonableness of a fee award, the Surrogate should consider such factors as the extent of services provided, the amount of time spent on the matter, the level of sophistication required, and the size of the estate relative to the amount of fees.

Morais v Malguarnera

Supreme Court of New York, Suffolk County

September 21, 2015, Decided

21211/2013

Reporter
2015 N.Y. Misc. LEXIS 3610 *; 2015 NY Slip Op 31831(U) **

[**1] MARIA MORAIS, as Executrix of the Estate of Antonio Casimiro, Plaintiff, - against - SALVATORE MALGUARNERA, JOAN SALOMON, as Executrix of the Estate of Joseph Salomon, PEOPLE'S UNITED BANK, and JOHN DOE #1 to JOHN DOE #10, these names being fictitious and unknown to the plaintiff, Defendants. INDEX No. 21211/2013, INDEX No. 09770/2014

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: People's United Bank v. Hallock Landing Assoc., LLC, 2012 N.Y. Misc. LEXIS 1129 (N.Y. Sup. Ct., Mar. 7, 2012)

Counsel: [*1] For Plaintiff: PETER C. KAITERIS, P.C., Bayport, New York.

For Malguarnera, Defendant: RICHARD I. SCHEYER, ESQ., Nesconset, New York.

For Salomon, Defendant: NOVAK, JUHASE & STERN, ESQS., Mountainside, New Jersey.

For People's United, Defendant: JASPAN SCHLESINGER LLP, Garden City, New York.

Judges: PRESENT: Hon. THOMAS F. WHELAN, Justice of the Supreme Court.

Opinion by: THOMAS F. WHELAN

Opinion

[**2] ***ORDERED*** that for the purposes of this order, the above captioned actions are consolidated; and it is further

ORDERED that the motion by the plaintiff (#002) for an order pursuant to CPLR 3212 awarding her summary judgment on her complaints in the above entitled actions in which she seeks the partition and sale of eleven parcels of real party held by the plaintiff and defendant Malguarncra is considered under RPAPL Article 9 and granted solely to the extent that the several references contemplated by RPAPL Article 9 on the matters required to be determined by the court prior to the issuance of an interlocutory judgment are referred to a referee to hear and report; and it is further

ORDERED that the entry Clerk [*2] shall enter the plaintiff's motion (Sequence #002 above) for summary judgment as Sequence #001 in the electronic file maintained by the court in the second action above captioned bearing Index Number 09770/2014 and shall further enter this order as the court's determination thereof as Motion Decided (MOTD); and it is further

ORDERED that the cross motion (#003) by the defendant, People's United Bank, for an order pursuant to CPLR 3212 granting it summary judgment on the counterclaim and the cross claim asserted in its answer herein is denied; and it is further

ORDERED that Kenneth M. Seidell 6317248833, Fiduciary ID #215143, with offices located at 50 Route 111, Smithtown NY 11787, it is hereby

appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the parties to this action in the properties described in the complaints filed in the above entitled action in which partition and sale is sought, and an abstract of the conveyances by which the same are held, and to take proof of the plaintiffs' title and interest in the subject properties, as well as, those of the other parties to the action, if any, and of the several matters set forth in the complaint such as, [*3] 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 par ties an opportunity to account for such items, and to report on these matters; and to report whether the property. or any part thereof, is so circumstanced that a partition thereof cannot be made without real prejudice to the owners, and if said appointed referee arrives at the conclusion that a sale of the properties, or any part thereof, is necessary, then said referee is to ascertain whether there is any creditor, not a party to this action, who has a lien on the undivided share or interest of any party; which report is required prior to the issuance of an interlocutory judgment and it is further; and it is further

ORDERED that within thirty days of the date of this order, plaintiff shall serve upon the Referee a search certified by the Suffolk County Clerk of any and all liens outstanding against the subject property; [**3] and if the referee ascertains the existence of at least one creditor or non-party creditor, said referee shall cause a notice in the form set forth below to be published once in each week for four (4) [*4] successive weeks in the South Shore Press, requiring each person not a party to this action who, at the date of this order, has 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 or her lien and the true amount due to him or her by reason thereof and to further serve all such named party creditors with such notice by mail at such creditor's last known address, if known to the referee, not less than twenty (20) days prior to the specified hearing date; and it is further

ORDERED that the notice to nonparty creditors required by RPAPL § 913, if any, shall issue by the referee in the following form:

NYS SUPREME COURT, COUNTY OF SUFFOLK

MARIA MORAIS, as Executrix of the Estate of Antonio Casimiro Plaintiff, -against- SALVATOR MALGUARNERA, JOAN SALOMON, as Executrix of the Estate of Joseph Salamon, PEOPLES UNITED BANK, and JOHN DOE #1 to JOHN DOE #10 these last 10 names being fictitious and unknown to the plaintiff Defendant.

Index No. 21211/2013 AND Index No. 9770/2014

Assigned to: Justice Whelan

TO ALL CREDITORS NOT PARTIES TO THE ABOVE ENTITLED ACTION WHO HAVE LIENS ON THE UNDIVlDED SHARE OR INTEREST [*5] OF ANY PARTY:

PLEASE TAKE NOTICE that each and every person whether a party or not a party to the above entitled action who, at the date of the order appointing the undersigned referee namely, (date) had a lien upon any undivided share or interest of a party in the property hereinafter described, is hereby required to appear before the undersigned at (address), (city), New York, on or before (date), to prove such lien and the true amount due or to become due by reason thereof.

The properties herein are described in the complaint as follows: .

DATED: _

(Referee).

and it is further,

[**4] ***ORDERED*** the Referee shall serve notice of all hearings to all parties joined to these actions regarding the matters referred to above referee not less than 20 days prior to the hearing date of the

RPAPL § 913 hearing date and is empowered to conduct such further hearings on like notice to the parties with respect to issues related to the other matters embraced by the reference framed above; and it is further

ORDERED that the Referee shall report to the Court as to all matters embraced by the reference contained herein, with all deliberate speed, following the hearings conducted, and it is further

ORDERED *[*6]* that pursuant to CPLR 8003(a), the compensation of the referee herein appointed is fixed at the rate of a reasonable hourly fee not exceeding $250.00 per hour and the calculation thereof shall be included in the report of the referee and supported by an affirmation of services which shall be attached to said report and served upon all parties, and the compensation of the referee, as fixed and determined by the court, shall be assessed against the parties as directed by the court in a subsequent order; and it is further

ORDERED that pursuant to 22 NYCRR §36.1, the referee herein appointed shall be subject to Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that by accepting this appointment, the appointee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointments based on compensation"), and if the appointee is disqualified from receiving an appointment pursuant to the provisions of Part 36, the appointee shall notify the appointing Judge forthwith.

In August of 2013, the plaintiff commenced the first action captioned above for the partition and sale of the following [*7] improved parcels of real property: 1) 465 Blue Point Road, Farmingville, New York; 2) 360 Hawkins Avenue, Lake Ronkonkoma, New York; and 3) 532 Route 25A, Rocky Point, New York. This claim is premised upon allegations that the plaintiff's decedent and defendant, Salvatore Malguamera (Malguarnera), are the owners as tenants in common of the properties, and that a partition of the properties is not feasible, requiring a sale thereof. In a second cause of action, the plaintiff demands an accounting of the expenses of the subject parcels due to the fact that the plaintiff has been denied adequate information from Malguarnera regarding rents collected on the properties, as well as, the sums paid for the maintenance thereof. As to the remaining known defendants, namely, Joan Salomon, as the Executrix of the Estate of Joseph Salomon (Salomon), and the People's United Bank (PUB), the plaintiff alleges that they are joined herein due to their status as judgment-creditors possessing possible liens on Malguamera's one-half interest in the properties.

The plaintiff is the daughter of the deceased, Antonio Casimiro (Casimiro). It is undisputed that Casimiro and Malguarnera were long-time business [*8] partners who purchased the properties as tenants in common with each party owning an undivided one-half interest, that they developed said properties, and [**5] that they then caused them to be rented in whole or in part to third-parties. Casimiro passed away on February 5, 2011, and the plaintiff was issued letters testamentary by the Suffolk County Surrogate's Court. After commencing the action, the plaintiff learned that her father and Malguarnera had purchased an additional eight parcels of undeveloped real property as tenants in common. She thus commenced the second action captioned above (Action #2 bearing Index Number 09770/2014) against the same defendants in which she seeks a judgment of partition and sale of those eight parcels and accounting of the expenses thereof. By order dated October 8, 2014(Garguilo, J.), the court granted the plaintiff's motion for consolidation by directing a joint trial of this action with Action #2.

In his answer to the complaint served in the first action, Malguarnera admits that he and the plaintiff are tenants in common regarding the properties, and that the plaintiff has an undivided one-half interest

therein. Malguarnera also sets forth a single [*9] affirmative defense that alleges, among other things, that he and Casimiro had an oral agreement that the properties would not be sold without the consent of the both of them, that he had explained to Casimiro before his death that the "real estate market was not good and selling would not produce enough income to justify the sale," and that the equities do not favor the plaintiff. In addition, Malguarnera sets forth a counterclaim alleging that he has not been reimbursed for paying the real estate taxes on his own, and claiming additional "management and real estate fees" for maintaining and managing the properties.

The plaintiff now moves for summary judgment on the complaints served in both actions in which she demands a judgment of partition and sale as to each of the eleven properties specified therein and an accounting of the expenses of each parcel. Defendant Malguarnera, through the affirmation of his counsel, consents to the partition and sale of the eight undeveloped parcels that are the subject of the second action captioned above. However, Malguarnera, challenges the plaintiff's entitlement to partition and sale and the complaint served in the first action captioned above [*10] which targets the three parcels which were improved with commercial buildings by Malguarnera and the plaintiff's decedent. While the court is without receipt of opposing papers from defendant Salomon, who appeared herein by answer, defendant Peoples United Bank seeks summary judgment on its counterclaim against the plaintiff and its cross claim against defendant Malguarnera in which said defendant seeks a turnover of any monies the plaintiff or Malguarnera may recover in this action.

In light of the consent by defendant Malguarnera to the plaintiff's demands for partition and sale of the eight undeveloped properties that are the subject of the second action bearing Index Number 9770/2014 and the lack of opposition to those portions of this motion wherein the plaintiff seeks such relief from the other appearing defendants, those portions of this motion wherein the plaintiff seeks summary judgment on its complaint in the second action captioned above is granted to the extent that the plaintiff is entitled to an interlocutory judgment of the type contemplated by RPAPL § 915, subject to determination by the court of the matters referred to the referee appointed herein to hear and report as directed. [*11]

[**6] Those portions of the plaintiff's motion for summary judgment on its complaint served in the first action captioned above, which targets for partition and sale three parcels of commercially developed land is likewise granted for the reasons set forth below.

RPAPL §901(1) provides: "A person holding and in possession of real property as a joint tenant or a tenant in common, in which he has an estate of inheritance ... 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." A party jointly owning real property with another may, as a matter of right, seek a partition of the property or a partition and sale when he or she no longer wishes to jointly own or use the property (***Manganiello v Lipman***, 74 AD3d 667, 905 NYS2d 153 [1st Dept 2010]). If a plaintiff demonstrates her ownership and the right of possession of the subject property and that a partition cannot be made without prejudice to its owners, she is entitled to judgment, as a matter of law, on her partition and sale action, unless a triable issue of fact is raised by a defendant (*see* ***Galitskaya v Presman***, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; ***Donlon v Diamico***, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]). While an agreement between the parties not to bring an action for partition is a good defense to such [*12] an action (*see* ***McLoughlin v McLoughlin***, 67 AD3d 751, 889 NYS2d 610 [2d Dept 2009]), it is well settled that if the agreement is not in writing, its enforcement is barred by the statute of frauds (*see* ***Goldberg v Goldberg***, 173 AD2d 679, 570 NYS2d 333 [2d Dept 1991]; ***Casolo v Nardella***, 193 Misc 378, 84 NYS2d 178 [Sup Ct., 1948], *affd*

275 AD 502, 90 NYS2d 420 [3d Dept 1949]).

Partition, although statutory, is equitable in nature (*see* ***Koniosis v Tsororos***, 83 AD3d 665, 920 NYS2d 403 [2d Dept 2011], and the court "may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale" (***Freigang v Freigang***, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]; *see also* ***Berlin v Wojnarowski***, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]). 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]). Thus, the court is obligated to ensure that there is an accurate accounting before entry of an interlocutory judgment directing a sale of the property (*see* RPAPL § § 911, 915; ***Colley v Romas***, 50 AD3d 1338, 857 NYS2d 260 [3d Dept 2008]; ***Donlon v Diamico***, 33 AD3d 841, 823 N.Y.S.2d 483, *supra*).

Before a partition may be directed, a determination must be made as to the rights, shares, or interests of the parties and, in those cases wherein a sale is demanded, rather than an actual physical partition, whether the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners (*see* RPAPL § 915). Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either [*13] a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; ***Hales v Ross***, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011); *see also* ***Lauriello v Gallotta***, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; ***Wolfe v Wolfe***, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report (*see* RPAPL § 911; § 907; ***Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William***, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]; *see also* ***Colley v Romas***, 50 AD3d 1338, 857 N.Y.S.2d 260, [**7] *supra*). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interest in the premises is also required and, if there be any such creditors, proceedings thereon must be held as required by RPAPL § 913. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference and the proceedings required thereon, a finding to that effect should issue.

Upon its review of the moving papers the court finds that the plaintiff has established her prima facie entitlement to summary judgment on her first cause of action seeking a partition or sale of the property as a matter of right (*see* Real Property Actions & Proceedings Law Article 9; ***Donlon v Diamico***, 33 AD3d 841, 823 N.Y.S.2d 483, *supra;* ***Tedesco v Tedesco***, 269 AD2d 660, 702 NYS2d 459 (3d Dept 2000], *lv denied* 95 N.Y.2d 791, 733 N.E.2d 230, 711 N.Y.S.2d 158 [2001]; 24 NY Jur 2d, Cotenancy and Partition § § 126-131;3 Warren's Weed NY Real Property, Common Ownership of Real Property § 27.18[1]-[3]). The plaintiff further demonstrated, that the affirmative defense set forth in the [*14] answer of Malguarnera, which is premised upon clams of a downturn in the real estate market and its long lasting poor quality, is not a cognizable defense to an action for partition.

In opposition to the motion, Malguarnera submits the affirmation of his attorney who repeats the allegations set forth in Malguarncra's affirmative defense and further contends that Malguarnera has a "major defense" to the statute of frauds as the subject "oral contract [was] fully performed by the parties for almost 20 years," and that "[a]ll the equities have to favor the Plaintiff, they do not." In addition, counsel for Malguarnera contends that the plaintiff's motion for summary judgment is premature as no discovery has been conducted. He avers that "[w]hat the parties knew, or what they acted upon are the appropriate subject for discovery," and that Malguamera's counterclaim itself requires discovery. Here, Malguarnera

submits the affidavit of his attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (*see* ***Sanabria v Paduch***, 61 A.D.3d 839, 876 N.Y.S.2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). Regardless, said affirmation does not set forth any factual allegations regarding the equities between the parties. In addition, [*15] Malguarnera has failed to set forth a reason to conduct discovery. Here, it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence.

However, the court rejects the contention that Malguarnera has raised an issue of fact whether the alleged oral agreement is enforceable under an exception to the statute of frauds for "full performance" is without merit. Pursuant to GOL 5-703(3), "[a] contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent." Black's Law Dictionary defines performance as "[t]hc successful completion of a contractual duty, [usually] resulting in the performer's release from any past or future liability; execution (2) Also termed full performance. Through his counsel, Malguarnera claims that the alleged oral agreement has been partially performed by Casimiro and Malguarnera.

[**8] Part performance, also an exception to the statute of frauds, will "render a contract [*16] enforceable only where such performance is unequivocally referable to the alleged agreement" (*see* ***Town of Oyster Bay v Doremus***, 94 AD3d 867, 942 NYS2d 546 [2d Dept 2012], *quoting* ***Jonestown Place Corp. v 153 W. 33rd St. Corp.***, 53 NY2d 847, 422 N.E.2d 820, 440 NYS2d 175 [1981]). That is, the acts relied upon to indicate part performance must be "unintelligible, or at least extraordinary" unless incident to the contract (***Anostario v Vicinanzo***, 59 NY2d 662, 450 N.E.2d 215, 463 NYS2d 409(1983]; *see Pinkava v Yurkiw*, 64 AD3d 690, 882 NYS2d 687 [2d Dept 2009]). If the actions of the parties are reasonably explicable on some other ground, they are not sufficient to take the case out of the statute (*see* ***Klein v Klein***, 79 NY2d 876, 589 N.E.2d 382, 581 NYS2d 159 (1992]; ***745 Nostrand Retail Ltd. v 745 Jeffco Corp.***, 50 A.D.3d 768, 854 N.Y.S.2d 773 [2d Dept 2008]).

Here, even accepting as fact the allegation that Casimiro and Malguarnera did not sell the properties "for almost 20 years," Malguarnera's contention that said act should be interpreted as part performance of an alleged oral contract "not to sell without the consent of both parties" is without merit. The fact that the property was not sold for an extended period of time is not the only reasonable explanation of that act.

The court also rejects Malguarnera claim that the plaintiff's motion is premature due to the absence of discovery. CPLR 3212(f) provides that "'should it appear from affidavits submitted in opposition to the motion that facts essential [*17] to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant and admissible evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff' (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Garcia v Lenox Hill Florist III, Inc.***, 120 AD3d 1296, 993 NYS2d 86 (2d Dept 2104); ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on

matters material to those at issue (*see* ***KeyBank N.A. v Chapman Steamer Collective, LLC***, 117 A.D.3d 991, 986 N.Y.S.2d 598 [2d Dept 2014); ***Anzel v Pistorino***, 105 A.D.3d 784, 962 N.Y.S.2d 700 [2d Dept 2013] ***Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC***, 89 A.D.3d 922, 932 N.Y.S.2d 540 [2d Dept 2011]; ***Zheng v Evans***, 63 AD3d 791, 881 NYS2d 461 [2d Dept 2009], *supra*).

Here, the opposing papers submitted by Malguarnera were insufficient to satisfy the aforementioned statutory burden as he failed to offer an evidentiary basis to show that discovery may lead to relevant and admissible evidence and that the facts essential to justify opposition to the motion [*18] were exclusively within the knowledge and control of the plaintiff. In addition, Marlguarnera failed to show that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact. The claim of prematurity is thus rejected as unmeritorious.

[**9] The plaintiff's moving papers further established the plaintiff's entitlement to the accounting demanded in her second cause of action which sounds in accounting, as does Malguanera's in a counterclaim asserted in his answer. Since the court is directing a reference which includes the issues that encompass an accounting, the parties demands for such relief are granted to that extent of such reference. Accordingly, the plaintiff's motion for summary judgment in her favor on pleaded claims for partition and sale of the eleven properties that are the subject of the two complaints filed and served and her demands for an accounting withe respect to each of said properties is granted to the extent that the plaintiff is entitled to an interlocutory judgment of the type contemplated by RPAPL § 915, subject to determination of the court of the matters referred to the referee appointed to hear and report as herein directed.

The cross [*19] motion (#003) by defendant, Peoples United Bank (PUB), for summary judgment in its favor on the counterclaim asserted against the plaintiff and the cross claim asserted against Malguarnera is denied. As indicated above, PUB seeks an order directing the respective parties to turnover any proceeds from the income or sale of the properties directly to PUB in partial or full satisfaction of two money judgments for foreclosure deficiencies against Malguarnera. In support of its motion, PUB submits the pleadings in this action and Action #2, copies of two money judgments obtained against Malguarnera, and the court order setting these actions down for joint trial. The motion is opposed by defendant Salomon.

The court finds, however, that PUB's motion is an ill-fated attempt to utilize the procedures in CPLR Article 52 to enforce its judgments against Malguarnera and/or the plaintiff. A judgment debtor may seek to enforce its judgment by making an application for an order directing the judgment creditor or a person in possession of money or property of the judgment creditor to turnover such property. CPLR 5225(a) provides that when the person against whom such an application is made is the judgment debtor, the procedure [*20] is a mere "motion ... upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money ..., to deliver any other personal property, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." In addition, the motion is to be made in the action which resulted in the subject judgment and should bear the caption of that action and court subject to certain exceptions not relevant herein. Here, the motion is not made in the actions which resulted in the judgments against Malguarnera, neither has PUB submitted evidence that Malguarnera was given proper notice of the motion.

CPLR 5225(b) provides that when the person against whom such an application is made is "a person in possession or custody of money or other personal property in which the judgment debtor has

an interest," the application is made " [u]pon a special proceeding commenced by the judgment creditor." Setting aside for the moment whether the plaintiff is a "person [*21] in possession or custody of money or other personal property" in which Malguarnera has an interest pursuant to said Article, PUB has not commenced [**10] a special proceeding against the plaintiff herein. Accordingly, PUB's motion is procedurally defective and it is denied in its entirety.

More importantly, PUB has not established the priority of its lien against Malguamera's undivided one-half interest in the properties relative to Salomon or any other lien holders that may be discovered in the process mandated by statute upon the reference made herein. Before the Court can render an interlocutory judgment for the sale of the properties, it must 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 (*see* RPAPL § 913[1]). The fact that PUB and Salomon have been named as permissible defendants herein pursuant to RPAPL § 904 does not establish that there are no other parties with liens against the properties.

In any event, the referee appointed herein must serve all defendant creditors and all non-party creditors, if any, with the notice of hearing set forth above at which it may present evidence of its lien. The court thus finds [*22] that PUB's right to recover against the properties is more properly adjudicated within the context of the process set forth in statutes governing this partition action. Accordingly, PUB's motion for summary judgment on its counterclaim and cross claim is denied.

Dated: September 21, 2015

/s/ Thomas F. Whelan

THOMAS F. WHELAN, J.S.C.

Donlon v. Diamico

Supreme Court of New York, Appellate Division, Second Department

October 24, 2006, Decided

2004-05110, (Index No. 6152/03)

Reporter
33 A.D.3d 841 *; 823 N.Y.S.2d 483 **; 2006 N.Y. App. Div. LEXIS 12761 ***; 2006 NY Slip Op 7690 ****

[****1] Barbara Donlon, Also Known as Barbara T. Donlon, Respondent, v Gloria Diamico, Also Known as Gloria D'Amico, Appellant, et al., Defendant.

Subsequent History: Settled by Donlon v. Diamico, 2008 N.Y. Misc. LEXIS 9777 (N.Y. Sup. Ct., Nov. 6, 2008)

Case Summary

Procedural Posture
In an action for the partition and sale of real property and for an accounting, defendant appealed an order of the Supreme Court, Queens County (New York), which granted plaintiff's motion, inter alia, for summary judgment directing that certain real property be partitioned and sold at public auction and denied defendant's cross-motion for summary judgment dismissing the complaint.

Overview
On appeal, the court found that there were no triable issues of fact regarding plaintiff's right to possession of the property, which was all that she needed to maintain the present partition action under RPAPL 901(1). Further, plaintiff established her entitlement to summary judgment directing that the real property be partitioned and sold at public auction by demonstrating that the subject property was so circumstanced that partition alone could not be made without great prejudice to the owners. In response, defendant failed to demonstrate the existence of a triable issue of fact sufficient to defeat plaintiff's motion. Contrary to defendant's contention, it could not be said that the equities favored dismissal of the action. The court noted that prior to the entry of an interlocutory judgment directing the sale of the subject property, an accounting had to be made of the income and expenses of the property, including but not limited to insurance costs, taxes, rents, and maintenance costs.

Outcome
The court modified the lower court's order by adding a decretal paragraph thereto directing that an accounting be made prior to the entry of an interlocutory judgment directing the sale of the subject premises. The court affirmed the order as modified.

Counsel: Joseph Edward Brady, P.C., Howard Beach, N.Y., for appellant.

Farley & Kessler, P.C., Jericho, N.Y. (Cary D. Kessler and Susan R. Nudelman of counsel), for respondent.

Judges: Howard Miller, J.P., Gloria Goldstein, William F. Mastro, and Mark C. Dillon, JJ. Miller, J.P., Goldstein, Mastro and Dillon, JJ., concur.

Opinion

[**483] [*842] In an action for the partition and sale of real property and for an accounting, the defendant Gloria Diamico, also known as Gloria

D'Amico, appeals from an order of the Supreme Court, Queens County (Satterfield, J.), dated May 4, 2004, which granted the plaintiff's motion, inter alia, for summary judgment directing that certain real property be partitioned and sold at public auction and denied her cross motion for summary judgment dismissing the complaint.

Ordered that the order is modified, on the facts and as a matter of discretion, by adding a decretal paragraph thereto directing that an accounting be made prior to the entry of an interlocutory [***2] judgment directing the sale of the subject premises; as so modified, the order is affirmed, with costs to the plaintiff.

[**484] "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 Wilbur v Wilbur*, 266 AD2d 535, 536, 699 NYS2d 103 [1999]; *Ferguson v McLoughlin*, 184 AD2d 294, 295, 584 NYS2d 816 [1992]; *Bufogle v Greek*, 152 AD2d 527, 528, 543 NYS2d 152 [1989]).

Here, there are no triable issues of fact regarding the plaintiff's right to possession of the property, which is all that she needed to maintain the present partition action (*see* RPAPL [****2] 901 [1]; *Dalmacy v Joseph*, 297 AD2d 329, 330, 746 NYS2d 312 [2002]). Further, the plaintiff established her entitlement to summary judgment directing that the real property be partitioned and sold at public auction by demonstrating that the subject property "was so circumstanced that partition [alone] thereof [***3] cannot be made without great prejudice to the owners" (*Chittenden v Gates*, 18 App Div 169, 173, 45 NYS 768 [1897]; *see* RPAPL 901 [1]). In response, the appellant failed to demonstrate the existence of a triable issue of fact sufficient to defeat the plaintiff's motion (*see Russo Realty Corp. v Katz*, 211 AD2d 673, 622 NYS2d 458 [1995]). Contrary to the appellant's contention, it cannot be said that the equities favor dismissal of the action (*cf. Ripp v Ripp*, 38 AD2d 65, 68-69, 327 NYS2d 465 [1973], *affd* 32 NY2d 755, 298 NE2d 114, 344 NYS2d 950 [1973]; *Stressler v Stressler*, 193 AD2d 728, 597 NYS2d 712 [1993]).

Prior to the entry of an interlocutory judgment directing the sale of the subject property, an accounting must be made of the income and expenses of the property, including but not limited to insurance costs, taxes, rents, and maintenance costs (*see* RPAPL 911, 915; *McVicker v Sarma*, 163 AD2d 721, 722, 558 NYS2d 997 [1990]; *Barol v Barol*, 95 AD2d 942, 943, 464 NYS2d 561 [1983]; *cf.* RPAPL 945).

[*843] The appellant's remaining contentions are without merit. Miller, J.P., Goldstein, Mastro and Dillon, JJ. [***4] , concur.

End of Document

Iannucci v Fiorentino

Supreme Court of New York, Suffolk County

October 28, 2015, Decided

4904/15

Reporter
2015 N.Y. Misc. LEXIS 5228 *; 2015 NY Slip Op 32722(U) **

[**1] JOSEPH IANNUCCI, JR., Plaintiff, -against- NICOLE FIORENTINO, Defendant. INDEX No. 4904/15

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Modified by, in part Iannucci v. Fiorentino, 2017 N.Y. Misc. LEXIS 777 (N.Y. Sup. Ct., Jan. 20, 2017)

Motion granted by, Motion denied by Iannucci v. Fiorentino, 2017 N.Y. Misc. LEXIS 3032 (N.Y. Sup. Ct., July 25, 2017)

Judges: [*1] PRESENT: Hon. THOMAS F. WHELAN, Justice of the Supreme Court.

Opinion by: THOMAS F. WHELAN

Opinion

ORDERED that this motion (#001) by the defendant for "partial summary judgment" in the form of an order directing an immediate sale by the referee of the premises that are the subject of her First and Second counterclaims sounding in partition and sale and the distribution of the proceeds based upon her rights, shares, and/or interests in the premises, is considered under CPLR 3212 and RPAPL Article 9 and is granted only to the limited extent set forth below; and it is further

ORDERED that the cross motion (#002) by the plaintiff for an order: 1) directing the parties to disclose, produce and exchange an accounting of income and expenditures made for the maintenance, repair, upkeep and acquisition costs and items taken or removed; 2) scheduling a hearing and/or trial with respect to claims arising out of the accountings produced by the parties; 3) [**2] upon the plaintiff's production of a lien search as to creditors, ascertainment by the Court whether any such lien should be recognized and recited in the interlocutory or final judgment; 4) upon the court's ascertainment of the rights of the parties and the ascertainment and recital of [*2] any lien, issuance of an interlocutory judgment pursuant to RPAPL, § 915; 5) the appointment of referee of sale, the terms of which are set forth in the interlocutory judgment issued; and 6) a preliminary injunction restraining the defendant from selling, transferring or disposing of the engagement ring which is the subject of the plaintiff's second cause of action, is considered under RPAPL Article 9 and CPLR 6311 and is granted only to the limited extent set forth below.

The claims interposed by the parties to this action arise out of their purchase, as joint tenants with survivorship rights, of an improved parcel of residential real property in Smithtown, New York in November of 2013, an engagement ring given to the defendant by the plaintiff, the payment of wedding events and the termination of the parties' relationship in August of 2014. According to the plaintiff, the defendant vacated the subject premises on August 30, 2014, without the consent of the

plaintiff, while the defendant claims that the defendant ousted her by changing the locks and by barring her from returning thereto.

In the complaint served and filed herein, the plaintiff seeks a partition of the subject premises or partition and sale if it be determined [*3] that actual partition may not be had without great prejudice to the parties' interests therein, and a division of the proceeds of sale according to the respective parties' rights, shares and interests upon an accounting of contributions, expenses and the like. In the Second cause of action, the plaintiff seeks the return of the engagement ring. In the remaining three causes of action, the plaintiff seeks recovery of a vacuum cleaner given to him and the defendant or its value under unjust enrichment theories and reimbursement for wedding expenses allegedly paid by the plaintiff. In the answer served, the defendant counterclaims for a judgment of partition and sale; distribution of the proceeds of the sale in accordance with the parties' rights, shares and interests as determined by a referee; a claim for, in effect, a judicial declaration that the defendant is entitled to keep the engagement ring; recovery of wedding expenses paid by the defendant; and the recovery of legal fees incurred by the defendant.

The defendant now moves (#001) for "partial summary judgment" on her partition counterclaim, in the form of an order directing the immediate sale of the property by a duly appointed [*4] referee of sale who shall thereafter ascertain the rights of the parties and an order directing the plaintiff to account for all income and expenses with respect to the property. The plaintiff cross moves (#002) for an order directing the parties to disclose and exchange an accounting of income and expenditures made for the maintenance, repair, upkeep and acquisition costs of the premises and items taken or removed therefrom. The plaintiff further demands an order scheduling a hearing or trial with respect to claims arising out of the accountings produced by the parties and upon the [**3] plaintiff's production of a lien search as to creditors, and an order by the court determining whether any such lien should be recognized and recited in the interlocutory or final judgment. Upon the court's ascertainment of the rights of the parties and its ascertainment and recital of any lien, the plaintiff demands that an interlocutory judgment issue by the Court pursuant to RPAPL § 915. Also demanded is the appointment of a referee of sale, the terms of which shall be set forth in the interlocutory judgment issued. Finally, the plaintiff seeks a preliminary injunction restraining the defendant from selling, transferring [*5] or disposing of the engagement ring which is the subject of the plaintiff's second cause of action.

For the reasons stated, the motion and cross motion are granted only to the extent set forth below.

The ancient remedies of actual partition and of partition and sale are premised in equity and are now codified in Article 9 of the Real Property Actions and Proceedings Law (*see* ***Chiang v Chang***, 137 AD2d 371, 529 NYS2d 294 [1st Dept 1988]; ***Worthing v Cossar***, 93 AD2d 515, 462 NYS2d 920 [4th Dept 1983]; ***Grody v Silverman***, 222 AD 526, 226 NYS 468 [1928]). Under RPAPL § 901, "a person holding and in possession of real property as a 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]; ***Tsoukas v Tsoukas***, 107 AD3d 879, 968 NYS2d 109 [2d Dept 2013]). Viable claims for partition and sale thus rest upon allegations of a joint or common ownership in real property, some showing that the equities favor the plaintiff and, where a sale rather than an actual partition is demanded, that a physical partition of the premises cannot be made without great prejudice to the parties (*see* ***Galitskaya v Presman***, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; ***Cadle Co. v Calcador***, 85 AD3d 700, 926 NYS2d 106 [2d Dept 2011]; ***James v James***, 52 AD3d 474, 859 NYS2d 479 [2d Dept 2008]).

The equitable nature of the remedies of partition and partition and sale permits the court to direct a severance of joint tenancies by a court-ordered partition that adjusts [*6] the rights of the parties and permits a sale of the premises where actual partition cannot be made without great prejudice to the parties (*see* ***Trotta v. Ollivier***, 91 AD3d 8, 933 NYS2D 66 [2d Dept 2011]); *see also* ***Koniosis v Tsororos***, 83 AD3d 665, 920 NYS2d 403 [2d Dept 2011]). Accordingly, the court "may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale" (***Freigang v Freigang***, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]; *see also* ***Berlin v Wojnarowski***, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]). 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]), as may a receipt by one party of more than his or her proper proportion of the rents, profits or like interest in the premises. Accountings [**4] by the parties have thus been held to be a necessary incident at a partition action and should be had as a matter of right before entry of an interlocutory or final judgment and before any division of money between the panics is adjudicated (*see* ***Sampson v Delaney***, 34 AD3d 349, 824 NYS2d 277 [1st Dept 2006]; ***Donlon v Diamico***, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]; ***McVicker v Sarma***, 163 AD2d 721, 558 NYS2d 997 [2d Dept 1990]; ***Worthing v Cossar***, 93 AD2d 515, 462 NYS2d 920 [2d Dept [1983]).

As indicated above, a determination as to whether the property or any part thereof is so circumstanced that a physical partition thereof cannot be made without great prejudice to the owners must he made where a sale is demanded (*see* RPAPL § 915) and, a determination must be made [*7] as to the rights, shares, or interests of the parties, which determination may include findings as to the parties' claims for an adjustment of the rights of any party due to the payment of excess expenditures by one party and/or the receipt by one party of more than his or her proper proportion of the rents, profits or interest in the premises. These determinations must be included in the interlocutory judgment contemplated by RPAPL § 915, along with either a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; ***Hales v Ross***, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011]; *see also* ***Lauriello v Gallotta***, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; ***Wolfe v Wolfe***, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties' claims and for an adjustment of such rights must be made by declaration of the court, directly, or by the court after a reference to take proof and report (*see* RPAPL § 911; § 907; ***Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William***, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interests in the premises is also required and, if there be any such creditors, proceedings thereon must be held as required by RPAPL § 913 where, as here, a sale is demanded. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference [*8] and the proceedings required thereon by RPAPL § 913, a finding to that effect should issue.

In light of these statutory prescriptions, the defendant's demand for an immediate sale of the premises is denied. These demands are interdicted by the procedural mandates imposed upon the court by the statutory provisions cited above and by controlling appellate case authorities (*see* ***Donlon v Diamico***, 33 AD3d 841, 823 N.Y.S.2d 483, *supra; see also* ***Sampson v Delaney***, 34 AD3d 349, 824 N.Y.S.2d 277, *supra*). While summary judgment has issued on claims for partition with a direction for an immediate sale and a reservation of the determination of disputed issues regarding claimed adjustments to the distribution of the proceeds of sale in cases where there were was no dispute as to the ownership interests of the parties in the premises, the rights or non-existence of creditors or that the remedy of partition and sale rather than

actual partition was proper because a physical partition would greatly prejudice the owners (*see* ***McCormick v Pickert***, 51 AD3d 1109, 856 NYS2d 306 [3d Dept 2008]; ***Wong v Chi-Kay [**5] Cheung***, 46 AD3d 1322, 847 NYS2d 793 [3d Dept 2007]), only the last of these factors appears to be indisputable here. In any event, controlling appellate ease authorities emanating from the Second Department and others have held otherwise particularly where findings [*9] regarding the income and expenses of the premises and equitable adjustments to the shares or interests in the premises are demanded and not determinable as a matter of law (*see* ***Donlon v Diamico***, 33 AD3d 841, 823 N.Y.S.2d 483, *supra;* ***Sampson v Delaney***, 34 AD3d 349, 824 N.Y.S.2d 277, *supra*). The defendant's demands for an immediate sale of the premises is thus denied. The defendants's demands for reference as to the ascertainment of the respective rights, shares and interests of the parties in the premises and an order directing the plaintiff to account for all income and expenses with respect thereto are granted only to the extent set forth below.

The court also denies the plaintiff's cross motion (#002) for discovery exchanges, as the interposition of the cross application for summary judgment may be deemed an admission that discovery was complete. In any event, the granting of the of the remedy of partition and sale together with the directives for an exchange of demands and proofs with respect to the costs and expenditures of the premises directed below forecloses the issue. The plaintiff's demand for a hearing by the court as to an accounting between the parties, rather than by reference of the kind provided for in RPAPL, § 911, is denied. The absence of [*10] any dispute with respect to the parties' entitlement to a severance of their joint tenancy by the remedy of partition and sale renders the reference set forth in RPAPL § 911 available to this court. Since both parties moved for summary judgment on their claims for partition and sale and in light of the nature of the subject property, which is improved with a residence, the court finds said premises are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners. The court thus grants summary judgment on the parties' claims for partition and sale, subject to the reference directed below and to the further reference to sell and report which shall be a subject of the interlocutory judgment to be entered herein.

The plaintiff's demands for a preliminary injunction restraining the defendant from selling, transferring or disposing of the engagement ring which is the subject of the plaintiff's second cause of action is denied. It is well settled law that an entitlement to preliminary injunctive relief rests upon the establishment of the following three elements: (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary [*11] injunction, and (3) a balancing of the equities in the movant's favor (*see* ***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 1028, 935 NYS2d 619 [2d Dept 2011]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see* ***Board of Mgrs. of the Britton Condominium v C.H.P.Y. Assoc.***, 101 AD3d 917, 918, 956 NYS2d 150 [2d Dept 2010]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). A movant must satisfy each requirement with "clear and convincing evidence" (County of Suffolk v Givens, 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013] *quoting* ***Apa Sec., Inc. v Apa***, 37 AD3d 502, 503, 831 NYS2d 201 [2d Dept 2007]). "Where the plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief" (***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]; *quoting* ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 763, 880 NYS2d 647 [2d Dept 2009]). Accordingly, a preliminary injunction will not issue where the harm alleged is purely economic in nature (*see* ***Quick v Quick***, 69 AD3d 827, 892 NYS2d 769 [2d Dept. 2010]) or where such harm is remote or speculative (*see* ***County of Suffolk v Givens***, 106 AD3d 943, 967 N.Y.S.2d 387, *supra;* ***Norton v***

Dubrey, 116 AD3d 1215, 983 NYS2d 679 [3d Dept 2014]; ***Rowland v Dushin***, 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; ***Family-Friendly Media, Inc. v Recorder Tel.***, 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]).

Here, the plaintiff failed to demonstrate that, absent the requested preliminary injunctive relief, he would sustain imminent irreparable harm of a non-economic nature that is real and concrete rather than remote or speculative. There are no allegations that the defendant possesses [*12] the ring and that she is or will dispose of it in a manner that will irreparably harm the plaintiff or render any judgment he may obtain, ineffectual, since monetary damages will fully compensate him for any loss sustained. The plaintiff's application for the preliminary injunctive relief outlined above is thus denied.

As to the remaining portions of the parties' motions, the court grants same only to the following limited extent and it denies all other demands for relief not set forth below. Accordingly the court further orders as follows:

ORDERED that the cross applications for summary judgment on the parties' claims for partition of the subject premises are granted subject to the matters referred below, as the court finds that the subject premises are so circumstanced that an actual physical partition could not be had without great prejudice to the owners; and it is further

ORDERED that STEPHEN L. O'BRIEN, 168 Smithtown Blvd., Nesconset, NY 11767, (631) 265-6660, Fiduciary ID# 193676, is hereby appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the parties to this action in the properties described in the complaints filed in the [*13] above entitled action in which partition and sale is sought, and an abstract of the conveyances by which the same are held, and to take proof of the parties' title and interest in the subject properties, and 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 [**7] of written demands, accounts and proofs of such items and after affording them the right to be heard with respect thereto; and the referee is directed to report on these matters; and the court having determined herein that the remedy of partition and sale is appropriate, because the subject property is so circumstanced that actual partition thereof cannot be made without great prejudice to the owners, the referee shall ascertain whether there are any creditors, not a party to this action, who have liens on the undivided share or interest of any party and, if so, the amount and the priorities of such lien, and to report thereon [*14] to the court this matter and the others listed above as directed below; and it is further

ORDERED that within 30 days of the date of this order, the plaintiff shall serve upon the Referee a search, certified by the Suffolk County Clerk, as to the existence of any and all liens against the subject property; and if the referee ascertains the existence of at least one non-party creditor, said referee shall forthwith cause a notice in the form set forth below to be published once in each week for four (4) successive weeks in the , requiring each person not a party to this action who, at the date of this order, has 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 or her lien and the true amount due to him or her by reason thereof; and the referee shall further serve all known creditors with such notice by mail at such creditor's last known address, if known to the referee, not less than twenty (20) days prior to the specified hearing date; and it is further

ORDERED that the notice to nonparty creditors required by RPAPL § 913, if any, shall issue by the referee in the following form:

NYS SUPREME [*15] COURT, COUNTY OF SUFFOLK
JOSEPH IANNUCCI, JR. Plaintiff, -against- NICOLE FIORENTINO, Defendant.
Index No. 04904/2015
Assigned to: Justice Whelan
TO ALL CREDITORS, PARTIES OR NOT. TO THE ABOVE ENTITLED ACTION WHO HAVE LIENS ON THE UNDIVIDED SHARE OR INTEREST OF ANY PARTY.

[**8] PLEASE TAKE NOTICE that each and every person whether a party or not a parry to the above entitled action who, at the date of the order appointing the undersigned referee namely, (date) had a lien upon any undivided share or interest of a party in the property hereinafter described, is hereby required to appear before the undersigned at (address), __ (city), New York, on or before (date), to prove such lien and the true amount due or to become due by reason thereof.
The properties herein are described in the complaint as follows: 39 Fulton Avenue, Smithtown, New York 11787. .

DATED: __

__(Referee).
and it is further,

ORDERED that the plaintiff is directed to forward the cost of the publication herein directed to the referee within three days of receipt of a written demand therefor, without prejudice to the interposition of a claim against the defendant for a credit of one-half of such amount at the time the [*16] referee's application for the fixation of his compensation, costs and expenses is made; and it is further

ORDERED that the Referee shall serve due notice of the RPAPL § 913 lien hearing date to counsel for the parties and to known creditors by mail, on not less than 20 days prior to such date, and shall conduct the hearing thereon on such date and may notice a hearing of the parties on all the other matters embraced by this reference, provided notice of the hearing of these additional matters is likewise given to counsel; but said referee is empowered to separately notice and conduct such further hearings on 20 days notice to counsel for the parties and others, if any be entitled, with respect to the other issues related to the other matters embraced by the reference framed above; and it is further

ORDERED that the Referee shall report his undertakings and findings to the Court, sequentially, following each hearing conducted, as to the matters embraced by the reference that were heard, with due and deliberate speed, and it is further

ORDERED that, within 75 days of the date hereof, the parties shall serve upon the referee and counsel for the adverse party, a single submission of documents that include [*17] copies of the parties' pleadings and an itemized statement of their demands for an adjustment of their rights, shares and interests in the premises due to their payment, in excess of their obligations under the law, of the expenditures made for ordinary maintenance, taxes, insurance and other necessary costs [**9] together with documentary proof of both the costs charged for such items and the payments made; sworn statements by each party as to their receipt of any income of any kind from the property including rent, insurance proceeds or other reimbursements since August 1, 2014; and the parties' respective demands for adjustments due to the receipt, by the other party, of more than his or her proper proportion of the rents, profits, income, proceeds, reimbursement or other interest in the premises; and such other demands and proofs as the parties may wish to submit, in this single submission to the referee which must include due proof of service upon the adverse party; and it is further

ORDERED that pursuant to CPLR 8003(a), the compensation of the referee herein appointed is fixed at the rate of a reasonable hourly fee not exceeding $250.00 per hour and a calculation of the

total thereof, together [*18] with cost and disbursements, shall be included in the report of the referee and supported by an affirmation of services which shall be attached to said report and served upon all parties together with an application for approval thereof; and the compensation of the referee, together with all costs and expenses, shall be fixed and determined by the court, after affording the parties the opportunity to submit responses to the referee's demands for compensation and fees, the payment of which, shall also be assessed against the parties as directed by the court in an order issued upon such application; and it is further

ORDERED that pursuant to 22 NYCRR §36.1, the referee herein appointed shall be subject to Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that by accepting this appointment, the appointee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointments based on compensation"), and if the appointee is disqualified from receiving an appointment pursuant to the provisions of Part 36, the appointee shall notify the appointing Judge forthwith.

DATED: [*19] 10/28/15

/s/ Thomas F. Whelan

THOMAS F. WHELAN, J.S.C.

Zarbis v Triades

Supreme Court of New York, Suffolk County

February 23, 2015, Decided

11-34964

Reporter
46 Misc. 3d 1224(A) *; 9 N.Y.S.3d 596 **; 2015 N.Y. Misc. LEXIS 659 ***; 2015 NY Slip Op 50283(U) ****

[****1] Catherine Zarbis and EMMANUEL ZARBIS, Plaintiffs, against Terry S. Triades and FRANCES TRIADES, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Prior History: Zarbis v. Triades, 2015 N.Y. Misc. LEXIS 692 (N.Y. Sup. Ct., Feb. 23, 2015)

Counsel: [***1] For Plaintiffs: LEWIS C. EDELSTEIN, ESQ., Garden City, New York.

For Defendants: ROSENBERG CALICA & BIRNEY LLP, Garden City, New York.

Judges: THOMAS F. WHELAN, J.S.C.

Opinion by: THOMAS F. WHELAN

Opinion

Thomas F. Whelan, J.

[****2] ***ORDERED*** that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor directing a partition and sale of certain real property in which the parties claim interests and for reimbursement of repair and maintenance expenditures related to the property is considered under RPAPL §901 and is denied.

The plaintiffs commenced this action for a judgment directing the actual partition of real property located at 2505 Soundview Avenue, Mattituck, Town of Southold, New York pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 9, or for the partition and sale of the premises at public auction. The complaint contains a singular cause of action for partition and an alternate demand for partition and sale. Following service of the summons and complaint, the defendants appeared herein by way of answer and therein asserted various affirmative defenses and two counterclaims, both of which sound in the recovery of monies expended under theories of unjust enrichment.

The property [***2] that is the subject of this action is improved with a single-family dwelling that sits a top of a large bluff contiguous to the shoreline of the Long Island Sound which the parties and other members of their family have used as a vacation home. According to the complaint, defendant Terry S. Triades is alleged to have purchased the premises on April 13, 1973, at which time, the premises were unimproved. In April of 1973, defendant Triades conveyed the premises to himself and his co-defendant wife and to the plaintiffs and to Nicholas and Olga Fourniotis, the parents of plaintiff, Catherine Zarbis and defendant Frances Triades. By deed dated July 19, 1973, title to the premises was conveyed by these three sets of owners to defendants, Terry S. Triades and Frances Triades "his wife". The deed reflecting this conveyance was recorded in the office of the

Suffolk County Clerk on September 17, 1993 (*see* Exhibit F of the moving papers). To date, title to the premises remains in the names of the defendants, alone, under the terms July 19, 1973 deed, which created a tenancy by the entirety between them.

Following the conveyance of title to the defendants in July of 1973, the parties to this action, [***3] along with Nicholas and Olga Fourniotis, entered into an written agreement dated October 2, 1974. The terms thereof provide that, notwithstanding the conveyance of title to the defendants, each of three married couples would "own", as tenants by the entirety, an undivided one-third share of the property. The plaintiffs thus claim a one-third ownership interest as tenants by the entirety in the premises under this agreement and an interest in common with the other owners of their respective one third interests. The agreement, which purports to bind the heirs, legal representatives successors and assigns of the signatories, also provides that expenses and costs pertaining to the maintenance of and improvements to the property, including but not limited to, real estate taxes, mortgages, insurance premiums and utilities "are to be shared equally" by the three couples. In a separate provision, the defendants agreed to convey title to the premises to all three couples if the Fourniotis' and the plaintiffs so demanded.

The agreement contains an acknowledgment that there was an outstanding mortgage encumbering the premises which gave the mortgagee the right to require payment in full if the [***4] premises were conveyed by the defendant owners, one or both of whom encumbered the property with the lien of the mortgage. An intention to avoid this contractual remedy which the defendants as owners, obligors and/or mortgagors conferred upon the mortgagee, is apparent from a reading of this provision of the agreement.

While it is undisputed that Nicholas Fourniotis passed away on June 29, 1986 and his wife, Olga passed away on August 26, 2006, the record is devoid of proof regarding the nature of their respective estates, their distributees, legatees, devisees or the appointment of personal representatives. The plaintiffs' nevertheless claim that the undivided one-third interest which the Fourniotis's allegedly had in the property under the terms of the Agreement "devolved to their children" namely, Catherine Zarbis and Frances Triades, in equal half shares. The plaintiffs further allege that they and the defendants, as tenants by the entirety, each have an undivided one-third interest in the premises and that Catherine Zarbis and Frances Triades, being the daughters of the Fourniotis' each have an additional undivided one-sixth interest in the property. Proof of the devolution of [***5] the interests of Nicholas and Olga Fourniotis upon their deaths is not found in the record adduced on this motion.

The defendants now move for "reverse" summary judgment awarding them a judgment of partition and sale of the property at public auction and an order directing payment to them, out of the proceeds of the sale, monies allegedly owing to them for repair and maintenance expenditures with the balance of the sale proceeds to be equally distributed between the parties. Defendants further contend that distribution of plaintiffs' portion of the net proceeds should be conditioned upon plaintiffs filing a federal tax lien release. According to the certified title report, dated March 4, 2014, the lien was marked released in Queens County but not Suffolk County (*see* Defendants' Exhibit F). In support of the motion, defendants submit, among other things, the affidavit of Terry S. Triades, the deed conveying the subject property to defendants, the agreement, the title report, correspondence between the parties, the pleadings and numerous documents related to repair work performed and expenses paid.

While the plaintiffs agree to the partition and sale of the property as prayed for in their [***6] complaint, they contest all other relief demanded by the defendants on this motion and go on to demand affirmative relief not pleaded by them in their

complaint. In their opposing papers, the plaintiffs claim that the defendants' breached their obligations under the terms of the October 2, 1974 agreement and have ousted the plaintiffs' from their right to possession of the premises. The plaintiffs submit, among other things, the affidavit of Catherine Zarbis wherein she disputes both the reasonableness and necessity of defendants' repairs and improvements and affirmatively asserts that plaintiffs are entitled to (1) a credit from the sale proceeds in the amount of $127,072.98 for insurance, real estate taxes, repairs, maintenance and improvements since 2005 and (2) an additional $425,749.37 for defendants' use and occupancy of the property following plaintiffs' ouster. Plaintiffs further request that the Court direct an upset price for the sale of the property in an amount not less than $1,650,000 (equivalent to 2013 appraisal report obtained by defendants) due to concerns that Terry Triades may enlist surrogates to drive down the sales price at auction. Although the plaintiffs' [****3] submissions [***7] repeatedly refer to the existence of a cross-motion for this affirmative relief, a review of the Court's electronic records reveals that no cross motion was filed nor fee paid by the plaintiffs. By way of reply papers, which also make mention of a cross motion, the defendants dispute the plaintiffs' opposition and their entitlement to any affirmative relief.

For the reasons stated, the motion is denied.

The ancient remedies of actual partition and of partition and sale are premised in equity and are now codified in Article 9 of the Real Property Actions and Proceedings Law (*see* ***Chiang v Chang***, 137 AD2d 371, 529 NYS2d 294 [1st Dept 1988]; ***Worthing v Cossar***, 93 AD2d 515, 462 NYS2d 920 [4th Dept 1983]; ***Grody v Silverman***, 222 AD 526, 226 NYS 468 [1928]). Under RPAPL § 901, "a person holding and in possession of real property as a 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]; ***Tsoukas v Tsoukas***, 107 AD3d 879, 968 NYS2d 109 [2d Dept 2013]). Accordingly, one owning an interest in real property with a right of possession such as a tenant, joint tenant or a tenant in common may seek physical partition of the property, or, a partition and sale thereof, if it appears that physical partition alone would greatly prejudice the owners of the premises (*see* ***Cadle Co. v Calcador***, 85 AD3d 700, 926 NYS2d 106 [2d Dept 2011]; [***8] ***Bufogle v Greek***, 152 AD2d 527, 528, 543 NYS2d 152 [2d Dept 1989]; *see also* ***Arata v Behling***, 57 AD3d 925, 870 NYS2d 450 [2d Dept 2008]; ***Wilbur v Wilbur***, 266 AD2d 535, 699 NYS2d 103 [2d Dept 1999]). While an accounting is a necessary incident of a partition action and should be had as a matter of right before entry of an interlocutory or final judgment and before any division of money between the parties is adjudicated (*see* ***Sampson v Delaney***, 34 AD3d 349, 824 NYS2d 277 [1st Dept]; ***Donlon v. Diamico***, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]; ***McVicker v Sarma***, 163 AD2d 721, 558 NYS2d 997 [2d Dept 1990]; ***Worthing v Cossar***, 93 AD2d 515, 462 NYS2d 920 [2d Dept [1983]), a sale without an accounting is permissible in cases wherein no accounting is demanded nor any claims for an adjustment of the rights of any party due to receipt by one party of more than his or her proper proportion of the rents, profits or share interest in the premises are asserted (*see* ***Robert McCormick v Pickert***, 51 AD3d 1109, 856 NYS2d 306 [2d Dept 2008]).

In the absence of an agreement against partition, a partition of real property owned by joint tenants or tenants in common is a matter of right whenever one or more of them do not wish to hold and use the property under their tenancies (*see* ***Smith v Smith***, 116 AD2d 810, 497 NYS2d 192 [3d Dept 1986]; ***Gasko v Del Ventura***, 96 AD2d 896, 466 NYS2d 64 [2d Dept 1983]; ***Chew v Sheldon***, 214 NY 344, 108 NE 522, 4 Bradb. 15, 14 Mills 543 [1915]). This right to the remedy of partition has been long recognized as a "valuable part of such interest in that it affords the owner a means of

disposing of his interest which cannot be defeated by his co-owners" (***Rosen v Rosen***, 78 AD2d 911, 912, 432 NYS2d 921 [3d Dept 1989]). The right to partition is not absolute, however, and while a tenant in common or joint tenant [***9] 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* ***Tsoukas v Tsoukas***, 107 AD3d 879, 968 N.Y.S.2d 109, *supra;* ***Pando v Tapia***, 79 AD3d 993, 995, 914 NYS2d 226 [2d Dept 2010]; ***Arata v Behling***, 57 AD3d 925, 926, 870 NYS2d 450 [2d Dept 2008]; ***Graffeo v Paciello***, 46 AD3d 613, 614, 848 NYS2d 264 [****4] [2d Dept 2007]).

Before a partition or sale may be directed, a determination must be made as to the rights, shares, or interests of the parties and, in those cases wherein a sale is demanded rather than an actual physical partition, whether the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners (*see* RPAPL § 915). Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; ***Hales Ross***, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011]; *see also* ***Lauriello v Gallotta***, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; ***Wolfe v Wolfe***, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report (*see* RPAPL § 911; § 907; ***Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William***, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]; *see also* ***Colley v Romas***, 50 AD3d 1338, 857 N.Y.S.2d 260, *supra*). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interest in the premises is also required and, if there be any such creditors, proceedings thereon must [***10] be held as required by RPAPL § 913. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference and the proceedings required thereon, a finding to that effect should issue.

The law is clear that in order to maintain an action for partition the plaintiff or other claimant must be the owner of an interest in real property and have legal title thereto or to a part thereof (*see* ***Sealy v Clifton, LLC***, 68 AD3d 846, 890 NYS2d 598 [2d Dept 2009]; ***Mohamed v Defrin***, 45 AD3d 252, 844 NYS2d 265 [1st Dept 2007]; ***Garland v Raunheim***, 29 AD2d 383, 288 NYS2d 417 [1st Dept 1968]; ***Gifford v Whittemore***, 4 AD2d 379, 165 NYS2d 201 [3d Dept 1957]; ***Harvey v Metz***, 271 AD 788, 65 NYS2d 85 [2d Dept 1946]; ***O'Connor v O'Connor***, 249 AD 515, 293 NYS 64 [2d Dept 1937]; ***McGillivray v Brundage***, 36 Misc 2d 106, 231 NYS2d 870 [Sup. Ct. Monroe Cty. 1962]; ***Fraser v Bowerman***, 104 Misc. 260, 171 NYS 835 [Sup Ct. Niagra Cty. 1918), aff'd. 187 AD 926, 174 NYS 903 [4th Dept 1919]). It is equally clear that a person who is possessed of an enforceable right to a conveyance of an interest in real property, but who is without legal title to such property, has no cognizable claim for partition (*see* ***Side v Brenneman***, 7 AD 273, 40 NYS 3 [1st Dep't 1896]).

Viable claims for partition and sale must thus rest upon allegations of a joint or common ownership in real property with attendant rights to possession and that the equities favor the claimant and, where a sale rather than an actual partition is demanded, proof that a physical partition of the premises cannot be made without great prejudice to the parties is also required (*see* ***Galitskaya v Presman***, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; ***Cadle Co. v Calcador***, 85 AD3d 700, 926 N.Y.S.2d 106, *supra;* ***James v James***, 52 AD3d 474, 859 NYS2d 479 [2d Dept 2008]). An award of summary judgment on a claim for partition is established only [***11] where the movant demonstrates its ownership interest and a right to possession under a deed or other instrument of conveyance, favorable equities and that a physical partition cannot be made without great prejudice in cases wherein a sale is demanded (*see* ***Tsoukas v***

Tsoukas, 107 AD3d 879, 968 N.Y.S.2d 109, *supra*, ***Arata v Behling***, 57 AD3d 925, 870 NYS2d 450 [2d Dept 2008]).

Here, the defendants have no pleaded claims for partition and appear to be without cognizable claims for such relief as they, alone, have legal title to the subject premises as tenants by the entirety. Nor have the defendants asserted pleaded claims for an adjustment of the rights of the parties in accordance with their ownership interests or for an accounting, as both of their pleaded counterclaims sound in direct claims for recovery of sums from the plaintiff under theories of unjust enrichment. Indeed, the answer served by the defendants includes a multitude of affirmative defenses by which the defendants disavow any entitlement on the part of the plaintiffs to the remedy of partition or partition and sale and to the incidental relief available under the statutory framework governing the remedy. An award of summary judgment under these circumstances is thus interdicted by controlling appellate [***12] case authorities which provide that summary judgment is not available to one asserting an unpleaded cause of action, although an unpleaded cause of action may be used by a plaintiff to defeat a defendants' motion for summary judgment dismissing the complaint (*see* ***Balashanskaya v Polymed Community Care Center, P.C***., 122 AD3d 558, 996 NYS2d 127 [2d Dept 2014]; ***Difabio v Jordan***, 113 AD3d 1109, 979 NYS2d 214 [4th Dept 2014]).

In apparent recognition of the foregoing principles, the defendants characterize their motion as one for "reverse" summary judgment on the plaintiff's complaint and for monetary relief under the equitable principles mentioned above which provide relief in the form of adjustments of monies available for distribution following a public sale of the premises to participating parties in some partition actions. However, the court rejects the defendants' attempt to secure an accelerated judgment of partition and sale in their favor under the guise of a motion denominated as one for "reverse" summary judgment on the plaintiff's complaint.

It is well established that the remedy of "reverse" summary judgment, which is contemplated by the provisions of CPLR 3212(b), is available only where a motion for summary judgment is made by the pleader of the claim and the court finds, that as a matter of [***13] law, an adverse, nonmoving party is entitled to summary judgment in his or her favor with respect to the claim that was the subject of the pleader's motion (*see* CPLR 3212(b); ***Dunham v Hilco Constr. Co***., 89 NY2d 425, 429—430, 676 N.E.2d 1178, 654 NYS2d 335 [1996]; ***Rodriguez v Sol Goldman Investments, LLC***, 115 AD3d 659, 981 NYS2d 761 [2d Dept 2014]; ***New Hampshire Ins. Co. v MF Global, Inc***., 108 AD3d 463, 970 NYS2d 16 [1st Dept 2013]; *cf.*, ***Pope v Safety and Quality Plus, Inc***., 74 AD3d 1040, 903 NYS2d 124 [2d Dept 2010]). Here, the plaintiffs made no motion for summary judgment on their complaint and their lack of legal title to the premises likely negates the success of any such application, as such title appears to be an element of their pleaded claim for the statutory remedy of partition or partition and sale.

In view of the foregoing, the court denies the instant motion by the defendants for summary judgment, as they failed to demonstrate their entitlement to such an award by the tender of proof in admissible form sufficient to eliminate all factual issues joined by the pleadings served in this action. This motion (#003) is thus denied.

Dated: February 23, 2015 [****5]

THOMAS F. WHELAN, J.S.C.

McIntosh v. McIntosh

Supreme Court of New York, Appellate Division, Second Department

January 27, 2009, Decided

2007-03054

Reporter
58 A.D.3d 814 *; 872 N.Y.S.2d 490 **; 2009 N.Y. App. Div. LEXIS 507 ***; 2009 NY Slip Op 512 ****

[****1] Lilleth McIntosh, Appellant, v Winston McIntosh, Respondent. (Index No. 27649/00)

Counsel: [***1] Stewart Law Firm, LLP, Rosedale, N.Y. (Charmaine M. Stewart of counsel), for appellant.

Judges: A. GAIL PRUDENTI, P.J., ROBERT A. SPOLZINO, WILLIAM E. McCARTHY, JOHN M. LEVENTHAL, JJ. PRUDENTI, P.J., SPOLZINO, McCARTHY and LEVENTHAL, JJ., concur.

Opinion

[*814] [**490]

In an action for the partition of real property, the plaintiff appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Queens County (Yablon, Ct. Atty. Ref.), dated March 9, 2007, as, after a hearing, awarded her the sum of only $96,350 of the $218,000 profit from the sale of the property.

Ordered that the judgment is affirmed insofar as appealed from, without costs or disbursements.

A tenant in common "has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he or she does not interfere with the right of [the other tenant] to also occupy the premises" (*Jemzura v Jemzura*, 36 NY2d 496, 503, [**491] 330 NE2d 414, 369 NYS2d 400 [1975]). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant 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]). Here, the plaintiff failed to establish [***2] that she was ousted from the property. Accordingly, the Court Attorney Referee properly found that the defendant [*815] was entitled to a credit for one-half of the payments made for maintenance, upkeep, and repair of the premises, including mortgage and insurance (*see Kwang Hee Lee v Adjmi 936 Realty Assoc.*, 34 AD3d 646, 824 NYS2d 672 [2006]; *Corsa v Biernacki*, 2 AD3d 388, 767 NYS2d 855 [2003]), and the plaintiff was entitled to one half of the amount of rent the defendant received (*see Degliuomini v Degliuomini*, 12 AD3d 634, 785 NYS2d 519 [2004]).

The plaintiff is not entitled to a new hearing based on the alleged untimeliness of the Court Attorney Referee's decision, as the plaintiff never sought a new hearing on this ground prior to the filing of the decision (*see* CPLR 4319; *Cooper v Cooper*, 52 AD3d 429, 862 NYS2d 32 [2008]).

[****2] The plaintiff's remaining contentions are without merit. Prudenti, P.J., Spolzino, McCarthy and Leventhal, JJ., concur.

Worthing v. Cossar

Supreme Court of New York, Appellate Division, Fourth Department

May 25, 1983

No Number in Original

Reporter
93 A.D.2d 515 *; 462 N.Y.S.2d 920 **; 1983 N.Y. App. Div. LEXIS 17506 ***

Ralph Worthing, Respondent, v. Phyllis Cossar, Appellant

Prior History: [***1] Appeal from a judgment of the Supreme Court (William J. Ostrowski, J.), entered February 10, 1982 in Niagara County, which (1) decreed that the subject real property was owned by the parties as tenants in common, (2) directed the sale of said property with an equal division of the proceeds between the parties, and (3) disallowed expenses claimed by defendant for mortgage payments, taxes, repairs and improvements.

Disposition: Judgment unanimously modified, and, as modified, affirmed, with costs to appellant and matter remitted to Supreme Court, Niagara County, all in accordance with opinion by Schnepp, J.

Case Summary

Procedural Posture

Defendant ex-wife sought review from a judgment of the Supreme Court, Niagara County (New York), which held that a former marital residence was owned by plaintiff ex-husband and defendant as tenants in common and directed that the property be sold and that the proceeds be equally divided. The judgment also disallowed various claims by defendant for repairs, improvements, tax, and mortgage payments.

Overview

Plaintiff ex-husband filed an action against defendant ex-wife to partition the parties' former marital residence, in which defendant was residing. The trial court determined that the property was owned by the parties as tenants in common, directed that it should be sold and that the proceeds should be equally divided, and disallowed claims by defendant for various payments made and expenses. Defendant sought review and the court affirmed with modifications. The court held that although plaintiff's ex parte divorce did not convert the tenancy by the entirety into a tenancy in common, such conversion occurred upon the parties' remarriages, which destroyed the spousal unity of the entirety estate. The court accordingly held that partition was proper. However, the court held that defendant was entitled to reimbursement for home repairs, where she proved the need for same, and for mortgage payments up until the time of her remarriage. The court held that denial of reimbursement for taxes was proper because plaintiff was ousted from the premises, and that plaintiff was entitled to one half of the rental value during the period of defendant's exclusive occupancy.

Outcome

The court affirmed the judgment which ordered partition of the property and determined that the former marital residence was held by plaintiff ex-husband and defendant ex-wife as tenants in common, where their remarriages had caused a conversion of the tenancy by entirety. The court modified the expenses and allowed defendant reimbursement for home repairs and mortgage payments.

Counsel: *Sax & Sax* (*Jonathan A. Sax* of counsel), for appellant.

Brick, Brick & Elmer, P. C. (*Thomas Elmer* of counsel; *Carol A. Condon* on the brief), for respondent.

Judges: Schnepp, J. Dillon, P. J., Doerr, Boomer and Green, JJ., concur.

Opinion by: SCHNEPP

Opinion

[*516] **OPINION OF THE COURT**

[**922] In this partition action defendant ex-wife appeals from a judgment after trial adjudging that the parties own their former marital residence as tenants in common, directing that the property be sold and the proceeds be equally divided between them and disallowing various claims by her for repairs, improvements, taxes and mortgage payments. [***5] Although we agree that the parties own the premises as tenants in common and that the property should be sold, we disagree with the trial court's distribution of the proceeds of the sale.

The parties were married in 1943 and in 1954 bought the single-family dwelling in which they lived together until February, 1968, when plaintiff moved to Seattle, Washington. Thereafter, he failed to make any payments on the existing mortgage on the premises. Defendant, however, continued to live on the property and she made the payments until the mortgage was fully paid and discharged in 1974. In 1969 plaintiff obtained an ex parte divorce in Seattle and later remarried. Defendant remarried on April 18, 1971, and after her remarriage lived in the marital residence with her new husband who died in September, 1980. On July 19, 1979 plaintiff commenced the within action to partition the property.

[*517] Defendant's claim that the trial court lacked jurisdiction to enter its interlocutory judgment because plaintiff's ex parte divorce was obtained without either service on her or an appearance by her is without merit. Although an ex parte divorce obtained without service of process or appearance [***6] by a spouse does not convert a tenancy by the entirety into a tenancy in common (see *Anello v Anello*, 22 AD2d 694), the subsequent marriages of both parties destroy "the spousal unity concept upon which tenancy by the entirety is based and [transform] their ownership into a tenancy in common" (*Topilow v Peltz*, 25 AD2d 874, 875). Thus, the remarriages of both parties in this case rendered the property subject to partition.

Next, defendant argues that the trial court erred in refusing to order reimbursement of sums expended by her in connection with the property for (1) repairs and improvements after commencement of the action, (2) taxes from 1974 through 1981, and (3) the mortgage payments before her remarriage. In addition, she argues that certain other allowances provided to her by the trial court were improperly offset by the rental value of the property during the term of her exclusive occupancy. These allowances were for her expenditures on (1) the mortgage after her remarriage; (2) repairs and maintenance before commencement of the action; and (3) fire insurance.

A partition action, although statutory (see RPAPL art 9), is equitable in nature and an accounting of [***7] the income and expenses of the property sought to be partitioned is a necessary incident thereof (24 NY Jur 2d, Cotenancy and Partition, § 242). A court may compel the parties to do equity as between themselves (14 Carmody-Wait 2d, NY Prac, § 91:242) and may adjust the equities of the parties in determining the distribution of the proceeds of sale (*Doyle v Hamm*, 52 AD2d 899, 900; *Sirianni v Sirianni*, 14 AD2d 432, 438). Thus, in general, expenditures made by a tenant in excess of his obligations may be a charge against the interest of a cotenant (see *Sirianni v Sirianni*, *supra*, p 438; see, also, *Vlacancich v Kenny*, 271

NY 164, 168; *Johnson v Depew*, 33 AD2d 645; *Goergen v Maar*, 2 AD2d 276, 277; 24 NY Jur 2d, Cotenancy and Partition, § 70).

[*518] [**923] In this case, the trial court erred by not granting defendant an allowance for her expenditures on home repairs after commencement of the action. 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* [***8] , 173 NY 91; *Cosgriff v Foss*, 152 NY 104; *Ford v Knapp*, 102 NY 135; *Vlcek v Vlcek*, 42 AD2d 308). However, "[the] 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*).

Defendant testified at trial that the house needed siding, that the shingles were "falling off", that the roof was "leaking", that "water was coming in around the front windows" and that she could not paint the house anymore. This testimony established that she acted in good faith in having siding installed on the house in 1980 and that the siding was necessary to protect the property. Contrary to the apparent holding of the trial court, the fact that she chose to have this work done after commencement of the action does not rebut the proof that she acted in good faith (cf. *Eldridge v Wolfe*, 129 Misc 617). Thus, she is entitled to be reimbursed one half the $ 4,400 cost of the siding (see *Doyle v Hamm*, 52 AD2d 899, *supra*).

The next [***9] allowance which defendant seeks is for the taxes which she paid from 1974 through 1981. Ordinarily, a tenant in common is entitled to be reimbursed for the share of the taxes paid by him for the benefit of his cotenants (see *Johnson v Depew*, *supra*). However, where, as here, a wife has remarried and lives in the former marital residence with her new husband, the former husband is effectively ousted from the premises, and as long as the wife's occupancy is exclusive, she alone is responsible for any charges assessed against the property (*Topilow v Peltz*, 25 AD2d 874, *supra*). The trial court, therefore, properly refused to reimburse defendant for these taxes.

[*519] Defendant also seeks to be reimbursed for the mortgage payments which she made before her remarriage on April 18, 1971. Although there is a presumption that mortgage payments and other payments for the upkeep and maintenance of the marital home made by a spouse prior to divorce are for the benefit of the other spouse (see *Sirianni v Sirianni*, 14 AD2d 432, *supra*), the presumption is rebutted by proof, such as that presented in this case, that the husband abandoned the wife and left her with the [***10] sole responsibility of maintaining the marital residence (see *Larsen v Larsen*, 54 AD2d 1073; *Doyle v Hamm*, 52 AD2d 899, *supra*). In any event, the parties in this case were divorced in 1969 and after this date the marital presumption was no longer operative. Under the circumstances it would be grossly inequitable to deny defendant's claim for reimbursement. We hold, therefore, that defendant is entitled to an allowance for her mortgage payments prior to April 18, 1971. Since there is no proof in the record of the amount of the monthly mortgage payment, it will be necessary for the trial court to determine the amount of this allowance (see *Larsen v Larsen*, *supra*; see, also, 10 Carmody-Wait 2d, NY Prac, §§ 70:432, 70:437).

The remaining issue raised by defendant concerns the exercise of the trial court's discretion in offsetting certain other allowances granted to her by the rental value of the property. It is clear that where a tenant has been ousted, a court may offset, as against the cotenant's credit for expenses incurred in maintaining the property, the reasonable value of the cotenant's exclusive use and occupancy (see *Yancey v Yancey*, 52 AD2d 603; *Miraldi* [***11] *v Miraldi*, 51 AD2d 538; *Vlcek v Vlcek*, 42 AD2d 308, 311, *supra*; see, also, *Daigle v*

Daigle, 73 AD2d 771; 14 Carmody-Wait 2d, NY Prac, § 91:259). The plaintiff here was certainly denied possession and enjoyment of the premises while defendant lived in it with her second husband (see *Topilow v Peltz*, 25 AD2d 874, *supra*). Under these circumstances plaintiff is entitled to one half of the rental value of the property during the period of his ouster (see *Miraldi v Miraldi*, *supra*). Although plaintiff did not establish the amount of the rental value, it is clear from the record that the home had some value and that in order to do equity between the [*520] parties it was necessary for the trial court to take this value into account. The trial court in effect found that the rental value of the property during the period of plaintiff's ouster equaled whatever credits defendant was entitled to for the mortgage and insurance payments, and for the repairs that she made during this period. In our view, there was sufficient proof in the record for the trial court to make this determination and it did not abuse its discretion in this regard.

Accordingly, the judgment [***12] appealed from should be modified to provide that defendant is entitled to be reimbursed from plaintiff's share of the proceeds of sale: (1) one half of the cost of siding the house in 1980, i.e., $ 2,200; and (2) one half of the amount of the mortgage payments made by her prior to her remarriage on April 18, 1971. The matter should be remitted to the trial court for further proceedings to determine the amount of the mortgage payment allowance.

Judgment unanimously modified, and, as modified, affirmed, with costs to appellant and matter remitted to Supreme Court, Niagara County, all in accordance with opinion by Schnepp, J.

Agudosi v. Berlin

Supreme Court of New York, Suffolk County

June 24, 2013, Decided

07-14200

Reporter
2013 N.Y. Misc. LEXIS 2713 *; 2013 NY Slip Op 31383(U) **

[**1] HESTER AGUDOSI and ANTHONY HERRING, Plaintiffs, - against - LESLI A. BERLIN, EVA MARIA RICCOBONI and JENNIFER SCHEFFER, as executrices of the estate of Milton Berlin, deceased, 84 LINCOLN LLC and ANNE LICURSI and MAUREEN LICURSI, as trustees of the ANNE LICURSI REVOCABLE TRUST, Defendants. INDEX No. 07-14200;LESLI A. BERLIN, EVA MARIA RICCOBONI and JENNIFER SCHEFFER, as executrices of the estate of Milton Berlin, deceased, Third-Party Plaintiff, - against - "JOHN DOE #1" TO "JOHN DOE #10" inclusive, the last ten names being unknown to the third-party plaintiff, the third-party defendants last named in quotation marks being parties all of whom claim some right or interest in the premises as tenants or otherwise, said names being fictitious, their true names being unknown to the third-party plaintiff, Third-Party Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: [*1] For Plaintiffs: PATRICK J. SULLIVAN, ESQ., Mineola, New York.

For Defendants/Third-Party Plaintiffs: STIM & WARMUTH, P.C., Farmingville, New York.

For 84 Lincoln and Licursi, Defendants: MARKOWITZ & RABBACH LLP, Melville, New York.

For Referee: JAKUBOWSKI, ROBERTSON, MAFFEI, GOLDSMITH & TARTAGLIA, LLP, St. James, New York.

Judges: PRESENT: Hon. JOHN J.J. JONES. JR., Justice of the Supreme Court.

Opinion by: JOHN J.J. JONES. JR.

Opinion

[**2] ***ORDERED*** that the motions (012 and 014) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 4403 and an order pursuant to CPLR 6513 extending the duration of the notice of pendency, and the motion (013) by the Referee, Frank Maffei, Jr., Esq. for an order approving his fees are consolidated for the purposes of this determination and are decided together with the cross motion by plaintiffs for an order pursuant to CPLR 4403; and it is further

ORDERED that the motion (012) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 4403 [*2] confirming in part and rejecting and/or modifying in part the report dated November 19, 2012 of the Referee, Frank Maffei, Jr., Esq. and granting an interlocutory judgment is determined herein; and it is further

ORDERED that the motion (013) by the Referee,

Frank Maffei, Jr., Esq. for an order approving his fees is granted; and it is further

ORDERED that the motion (014) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 6513 extending the duration of the notice of pendency regarding the subject property for an additional period of three years from the date of this order is granted; and it is further

ORDERED that the cross motion (015) by plaintiffs for an order pursuant to CPLR 4403 confirming in part and rejecting and/or modifying in part the report dated November 19, 2012 of the Referee. Frank Maffei, Jr., Esq. is determined herein.

This is an action for the partition of real property located at 84 Lincoln Avenue in Deer Park, New York pursuant to Real Property Actions and Proceedings Law (RPAPL) article 9 and for the reimbursement of expenses incurred [*3] with respect to said property. The subject property was purchased on September 1, 1972 by Caesar Herring and Frances Herring. They owned it as tenants by the entirety. By sheriff's deed dated August 24, 1988, Milton Berlin acquired the 50 percent interest of Frances Herring in the property. Thereafter, Milton Berlin and Caesar Herring each had a 50 percent ownership interest in the property as tenants in common. Then, by deed dated December 28, 1988, Milton Berlin transferred his interest in the property to himself and Ralph Licursi as tenants in common. Based on a Certificate of Title of the Suffolk County Registrar dated January 23, 1989, the subject property is a registered property under Article 12 of the Real Property Law, and on said date Caesar Herring had a 50 percent interest, Milton Berlin had a 25 percent interest and Ralph Licursi had a 25 percent interest in the subject property as tenants in common. Ralph Licursi died in 1995, Caesar and Frances Herring divorced in May 1995, Caesar Herring died intestate in August 2001, and Milton Berlin died in 2009.

The defendants and the third-party plaintiffs in this action claim to have received Frances Herring's interest in the subject [*4] property through various deeds and the plaintiffs claim interest in the property as distributees and heirs at law of Caesar Herring. The parties are in agreement that the plaintiffs have a 50 percent interest, the Berlin heirs have a 25 percent interest, and the Licursi heirs have [**3] a 25 percent interest in the subject property. The Court's computerized records indicate that the note of issue in this action was filed on July 27, 2011.

The prior order of this Court dated January 6, 2012 (Jones, J.) granted that portion of the motion of the defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased (Berlin heirs) for an order appointing a referee pursuant to RPAPL §§ 911 and 913. Said prior order appointed Frank Maffei, Jr., Esq. as Referee to ascertain and report as to the rights, shares and interests of the parties in the real property located at 84 Lincoln Avenue in Deer Park, New York and to perform an accounting. The Referee conducted a hearing on July 12, 2012 during which plaintiff Hester Agudosi, defendant Lesli Berlin and non-party witness Frances Herring all testified. Defendant Maureen [*5] Licursi, as trustee of the Ann Licursi Revocable Trust was notified by her counsel but did not appear at said hearing.

In his Findings of the Referee to Compute dated November 19, 2012, the Referee found that the plaintiffs, the children of Frances and Caesar Herring, who commenced this action in their individual capacity as compared to the capacity of an estate representative, are entitled to assert claims for credit or reimbursement of paid expenses starting from the date that their individual interests in the property as heirs of Caesar Herring manifested themselves, August 21, 2001, the date of Caesar Herring's death. The Referee determined that plaintiffs were entitled to be credited payments

made from August 21, 2001 onward by their mother, Frances Herring, for property taxes, mortgage principal and interest, homeowner's insurance and for an alarm system inasmuch as the payments were a benefit to the property and Ms. Herring established through clear and credible testimony that she made all payments to benefit her children. In addition, the Referee rejected defendants' arguments as unsupported by any evidence that an express or implied ouster occurred rendering defendants free [*6] from responsibility for expenses incurred by the tenant in common who occupied the premises and entitling them to an apportionment of rents, which he found were never collected nor was there an agreement to that effect.

The Referee also found that plaintiff Hester Agudosi established that all expenses claimed, for real estate taxes, mortgage interest and principal, homeowner's insurance and an alarm system, were reasonable expenses to meet plaintiffs' burden of preserving the property from waste and injury. The Referee determined that the total sums paid for taxes from 2001 to the second half of 2009 were $94.520.66, that each defendant is responsible for 25 percent of said sum at the time of sale of the property, such that plaintiff is entitled to a credit of $23,630.19 from each defendant entity for a total of $47,260.33. In addition, he determined that plaintiff is entitled to a 50 percent credit of tax payments made from the second half of 2009 through 2011 in the sum of $29,848.39, such that defendants' 50 percent contribution would be $14,924.95 with each defendant being responsible for $7,462.09. With respect to mortgage principal payments, the Referee found that payments made [*7] from August 1, 2001 continuing to plaintiff's last payment on July 24, 2008 resulted in a principal reduction from $20,699.23 to $14,591.58 for a total principal reduction of $6,107.65. He determined that defendant entities are responsible for 50 percent of said total or $3,053.85 with each defendant being responsible for $1,526.92. Regarding mortgage interest payments, the Referee found that said payments were made from August 1, 2001 up to and including July 24, 2008 totaling $8,679.57, and that defendant entities are responsible for 50 percent, $4,339.14, or $2,169.90 each and that plaintiff is entitled to a credit for said amounts. As for the homeowners insurance, the Referee found that plaintiff and/or Ms. Herring had made payments from April 1, 2004 up to and including August 22, 2011 to total $8,963.96 and determined that defendant entities are collectively responsible for 50 percent of said amount equaling $4.481.98 in total or 25 percent each in the amount of $2,240.99 and that plaintiff is entitled to a credit for said amounts. Finally, with respect to the alarm system, the Referee found that payments were made [**4] from July 2008 to January 2012 in the total amount of $2,438.00, [*8] that each defendant entity is responsible for 25 percent, such that plaintiff is entitled to a credit of $609.50 from each defendant entity. The Referee added that the percentage of responsibility for the aforementioned payments continue up to and including the time of sale of the property.

The Berlin heirs now move for an order confirming in part and rejecting and/or modifying in part the Referee's report. They assert that the Referee's computations for the amounts awarded for taxes paid from August 21, 2001 to the first half of 2009 are incorrect. In addition, the Berlin heirs challenge the Referee's finding that there was no ouster by asserting that upon purchase of Ms. Herring's portion of the property at the Sheriff's sale, Mr. Berlin could not occupy the property where Ms. Herring, her husband, and their family continued to reside, such that Mr. Berlin was impliedly ousted from the property at the moment of purchase and therefore he was not responsible for paying the costs of maintaining the property. They also challenge the Referee's finding that plaintiffs are entitled to recover monies that their mother paid, arguing that plaintiffs' mother paid said expenses because she enjoyed [*9] the use and occupancy of the premises and that plaintiffs were not required or expected to reimburse their mother's expenses. The Berlin heirs further challenge the Referee's finding that defendants are obligated to reimburse mortgage payments made by plaintiffs' parents on a loan or

debt that defendants were not obligors and never agreed to be personally liable to repay. The Berlin heirs add that they and plaintiffs each paid $459.05 constituting half of the hearing transcript expenses under protest and that they are each entitled to a credit from the Licursi heirs, who did not appear at the hearing, in the sum of $153.02 for their share of the cost. In support of their motion, the Berlin heirs submit the pleadings, the prior order of this Court dated January 6, 2012, the transcript of the hearing held before the Referee on July 12, 2012, copies of the exhibits submitted at the hearing, and the Referee's report.

The Licursi heirs contend in opposition to the motion of the Berlin defendants that the Referee's findings should be rejected to the extent that they seek to impose any liability on the Licursi heirs inasmuch as the Licursi heirs have settled the property expenses and property [*10] expense claims with plaintiffs pursuant to a partial stipulation of settlement dated February 16, 2013. They argue that said settlement is intended to supercede the Referee's findings, and that they should not be held responsible for any portion of the Referee's fees inasmuch as the Licursi heirs gave notice prior to the hearing that they were in the process of settling with plaintiffs, they did not make any pre-hearing or post-hearing evidentiary submissions, and they did not request the appointment of a referee. Their submissions in support of their opposition include a copy of the stipulation acknowledging settlement dated February 20, 2013 executed by the attorneys for plaintiffs and the Licursi heirs indicating that the settlement agreement's contents are strictly confidential and that the settlement agreement is intended to supercede the Referee's findings.

In reply, the Berlin heirs argue that the Licursi heirs are obligated to pay their proportionate share of the Referee's fees because at the time of the hearing the Licursi heirs had not yet settled and the settlement agreement did not exist.

Plaintiffs cross-move for an order confirming in part and rejecting and/or modifying [*11] in part the Referee's report. Plaintiffs seek confirmation of the report in every aspect except for the determination that plaintiffs are unable to recover contributions from the Berlin heirs for expenditures made on the premises prior to August 2001. In opposition to the cross motion, the Berlin heirs argue that the Referee was correct in determining that plaintiffs are not entitled to recover monies paid before they took title to the property and reassert that the Berlin heirs should not have to pay Frances Herring's mortgage or pay plaintiffs for monies paid by their mother, that there was an implied ouster, and that the expenses of the [**5] Referee should be shared equally by the parties.

One who holds an interest in real property as a tenant-in-common may maintain an action tor partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners (*see* RPAPL 901 [1]; ***Piccirillo v Friedman***, 244 AD2d 469, 664 NYS2d 104 [2d Dept 1997]; ***Bufogle v Greek***, 152 AD2d 527, 543 NYS2d 152 [2d Dept 1989]). "Partition, although statutory (RPAPL 9), is equitable in nature and the court may compel the parties to do equity between themselves when [*12] adjusting the distribution of the proceeds of the sale" (***Freigang v Freigang***, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (*see* ***Worthing v Cossar***, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). These include acquisition payments, such as down payments and mortgage payments (*see* ***Quattrone v Quattrone***, 210 AD2d 306, 307, 619 NYS2d 773 [2d Dept 1994]; ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893 [3d Dept 1973]; *see also* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property, if they were made in good faith and are of substantial benefit to the premises (see ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893). Mere occupancy alone by one of the tenants does not make that

tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see* ***McIntosh v McIntosh***, 58 AD3d 814, 872 NYS2d 490 [2d Dept 2009]; ***Misk v Moss***, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]).

"The decision of a referee shall comply with the requirements for a decision by the court and [*13] shall stand as the decision of a court" (*see* CPLR 4319). The Court may confirm or reject the referee's report, in whole or in part, and make new findings (*see* CPLR 4403; ***Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp***., 270 AD2d 303, 704 NYS2d 613 [2d Dept 2000]). The report and recommendations of a referee should be confirmed if the findings are supported by the record (*see* ***MacNiallias v Potter***, 82 AD3d 718, 917 NYS2d 895 [2d Dept 2011]; ***Ferentini v Ferentini***, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]; ***Capili v Ilagan***, 26 AD3d 354, 810 NYS2d 480 [2d Dept 2006]).

The circumstances of the subject action are quite similar to those of Gralicer v Johnstone, 144 AD2d 436, 534 NYS2d 15 (2d Dept 1988) wherein the Appellate Division, Second Department held that there was no evidence on the record that the purchaser at a sheriffs auction of the owners/occupants' interest in the property was ousted by the occupants after the purchase, and that the occupants' mere continued occupation of the house did not constitute an ouster (*see* ***Gralicer v Johnstone***, 144 AD2d 436, 534 NYS2d 15 [2d Dept 1988]). Thus, the Referee correctly determined that Milton Berlin and Ralph Licursi were not ousted upon [*14] their purchase of Frances Flerring's 50 percent interest in the property and that the Berlin heirs and Licursi heirs are not entitled to receive rent payments from the time of purchase (*see id*). Therefore, the Referee's findings concerning a lack of ouster are confirmed.

However, the Referee was incorrect in crediting plaintiffs with payments made solely by their mother. Frances Herring, on the property. Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant in a partition action (*see* ***Worthing v Cossar***, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). Their mother, Frances Herring, is not a party to this action and plaintiffs did not commence this partition action in their capacity as the heirs of their mother's estate. Thus, plaintiffs have no standing to seek the recovery of payments that were never made by them (*see* ***Sharrow v Sheridan***, 91 AD3d 940, 937 NYS2d 320 [2d Dept 2012], *lv denied* 19 NY3d 802, 946 NYS2d 104, 969 N.E.2d 221 [2012]). Plaintiffs may only recover payments they personally made on the property in excess of their obligations as against the Berlin heirs and Licursi heirs. The Court notes that plaintiff Anthony Herring [*15] did not appear at the hearing and there is no mention of his having made any [**6] payments with respect to the property. Paragraph 14 of the Referee's report indicates that the Referee found credible plaintiff Agudosi's testimony at the hearing regarding mortgage and property tax payments that she personally made during an approximate one-year period in the approximate total amount of $12,000 and that the documents submitted at the hearing supported said testimony. Paragraph 38 of said report indicates that the Referee found that the evidence established that payments were made by plaintiff Agudosi and/or her mother for homeowners insurance from April 1, 2004 up to and including August 22, 2011 totaling $8,963.96. However, the hearing transcript reveals that plaintiff Agudosi did not produce any evidence of the checks that she purportedly wrote for mortgage payments, a portion of which payments were purportedly used to pay property taxes, either during discovery or during the hearing and she could not recall the specific dates or amounts of said payments (*see* Hearing Tr. at 36-38). Therefore, the Referee's findings in paragraph 14 and paragraph 38 as pertains to plaintiff Agudosi are rejected [*16] as unsupported by the record. In addition, there is no indication in the Referee's report and no hearing testimony that plaintiff Agudosi made any payments for the homeowners

insurance or the alarm system (*see* Hearing Tr. at 36, 38, 71). Plaintiff Agudosi testified at the hearing that there was nothing in Plaintiffs' exhibits 2 or 3 that reflected a payment made by her (*see* Hearing Tr. at 84, lines 13-18). Plaintiff Agudosi also testified at the hearing "My mother made payments towards the mortgage, towards the insurance, toward repairs, and toward the security system. And it is my intent upon the sale of this house to take whatever proceeds come out of it to reimburse her." (*see* Hearing Tr. at 80, lines 22-25; at 81, lines 1-3). There is no evidence of any agreement for reimbursement between plaintiffs and their mother (*see* Hearing Tr. at 81-82, 117). It so follows that plaintiffs are not entitled to any credits for any payments made for property taxes, mortgage principal and interest, homeowner's insurance and for an alarm system on the subject property as they failed to demonstrate at the hearing that they personally made payments for said expenses. Therefore, the Court rejects [*17] those portions of the Referee's report, paragraphs 34 through 39, crediting plaintiffs with said payments. Based on the foregoing, the Referee's finding that plaintiffs' claims may not predate the date that they obtained a legal interest in the property, August 21, 2001, is correct and is confirmed.

The Berlin heirs also request an interlocutory judgment determining 1) that the property is so circumstanced that a partition cannot be made without great prejudice to the owners; 2) that plaintiffs and defendants own undivided interests in the premises as tenants in common; 3) that the property be sold at public auction; and 4) that the proceeds of the sale be distributed between the parties as provided by this Court. Prior to the rendering of an interlocutory judgment for the sale of real property, the Court must ascertain whether "there is any creditor not a party who has a lien on the undivided share or interest of any party" (*see* RPAPL 913 [1]). Therefore, that portion of the motion by the Berlin heirs is denied with leave to renew upon proper proof in the form of " [a] search certified by the clerk or by the clerk and register of the county where the property is situated that there [*18] is no such outstanding lien" (*see id*). Said motion to renew is to be accompanied by a copy of this order.

The Berlin heirs further move for an order pursuant to CPLR 6513 extending the duration of the notice of pendency for an additional period of three years from the date of this order. Their submissions in support of the request include a proposed order extending the duration of the notice of pendency. No opposition to this motion has been submitted.

The emergency order to show cause of the Berlin heirs was brought before the expiration of the existing notice of pendency and provided for the continuation of the notice of pendency pending the further order of the Court. Thus, the request is timely. In addition, the Berlin heirs made a showing of good cause for the extension (*see* CPLR 6513). Therefore, the motion to extend the duration of the notice of pendency for three additional years from the date of this order is granted.

[**7] The Referee moves for an order approving his fees in the sum of $5,622.50 and submits an invoice of services rendered as well as a proposed order. The Berlin heirs do not challenge the amount of the Referee's fees but rather the failure of the proposed order to [*19] indicate the apportionment of the fees among the parties. The Berlin heirs submit a counter-proposed order indicating that plaintiffs, the Berlin heirs and the Licursi heirs are to each pay one-third of the Referee's fee. The Licursi heirs also do not challenge the Referee's work or fee amount but oppose the motion to the extent that they are required to pay any portion of the requested fees. They argue that they notified the Referee by telephone and e-mail, prior to the hearing, that the Licursi heirs and plaintiffs intended to resolve the issues of property expense allocation and reimbursement on their own through settlement, and did not participate in the hearing or provide any pre-hearing or post-hearing submissions to be reviewed by the Referee, such that they are not liable for any portion of the Referee's fees. They admit that settlement

negotiations were continuing and not finalized at the completion of the Referee's hearing. The Berlin heirs contend that the assertions of the Licursi heirs lack merit inasmuch as they had no finalized settlement with plaintiffs during and at the completion of the hearing and note that the Licursi heirs failed to submit any opposition to their [*20] prior motion to appoint a referee and thus waived their right to complain about the Referee's fee.

Here, the Licursi heirs have failed to demonstrate that they are not liable for the Referee's fees. Notably, the Licursi heirs did not submit any opposition to the prior motion requesting the appointment of a referee and were subsequently bound by the order appointing a referee to compute and directing that the referee be paid his fees for his services. In addition, although the Licursi heirs intentionally defaulted at the hearing purportedly due to ongoing settlement negotiations with only the plaintiffs, the e-mails they submitted indicate that their attorney did not request an adjournment of the Referee's hearing pending completion of said settlement negotiations and the e-mails from plaintiffs' attorney to the Referee made no mention of any such settlement negotiations (*see generally* ***Salisbury v Binghamton Pub. Co***., 85 Hun 99, 32 N.Y.S. 652 [NY Sup Gen Term Feb 1895]; *Trieste Group LLC v Ark Fifth Ave. Corp*., 21 Misc 3d 1142 (A), 880 N.Y.S.2d 227, 2006 NY Slip Op 52674(U) [Sup Ct, New York County, 2006]). Based on the foregoing, the Court determines that the Licursi heirs are required to pay their [*21] proportionate share of the Referee's fees. The equal apportionment of the Referee's fee, despite the parties' unequal shares in the subject property, has been held to be a proper exercise of the court's discretion, given that none of the parties has prevailed completely (*see* CPLR 8103, 4321; RPAPL 981 [3]; ***H & Y Realty Co. v Baron***, 193 AD2d 429, 597 NYS2d 343 [1st Dept 1993]). Thus, the Court grants the request of the Referee for an order approving his fees in the sum of $5,622.50, and directs that plaintiffs, the Berlin heirs and the Licursi heirs are to each pay one-third of said sum to the Referee. In addition, the Berlin heirs and plaintiffs are each entitled to a credit from the Licursi heirs in the sum of $153.02 for their share of the cost of the hearing transcript.

The proposed orders extending the duration of the notice of pendency and approving the Referee's fees, as modified by the Court, are signed simultaneously herewith.

Dated: 24 June 2013

/s/ John J.J. Jones. Jr.

J.S.C.

End of Document

Misk v. Moss

Supreme Court of New York, Appellate Division, Second Department

June 19, 2007, Decided

2005-11116 (Index No. 10886/03)

Reporter
41 A.D.3d 672 *; 839 N.Y.S.2d 143 **; 2007 N.Y. App. Div. LEXIS 7702 ***; 2007 NY Slip Op 5477 ****

[****1] Mark Misk, Respondent, v Joyce G. Moss et al., Defendants, and Angela O'Brien, Appellant.

Case Summary

Procedural Posture
Defendant co-owner appealed an interlocutory judgment by the Queens County Supreme Court (New York) that granted plaintiff owner's motion to confirm a referee's report in his action to partition and sale their real property.

Overview
The referee determined, inter alia, that upon the sale of the subject real property, (1) the co-owner was to pay any outstanding liens against her late husband that a title company would require to be satisfied prior to closing, (2) she was to pay all outstanding water and sewer charges for the real property, and (3) she was to pay to the owner the value of her use and occupancy of the owner's one-half share of the real property from her share of the proceeds of sale. The appellate court found that contrary to the trial court's determination, the referee's finding that the co-owner should pay the value of her use and occupancy of the real property to the owner was not substantially supported by the record. While the co-owner, a tenant-in-common of the real property with the owner, did occupy the entire premises, that mere occupancy alone did not make her liable to the owner for her use and occupancy absent an agreement to that effect or an ouster of the owner. The evidence also failed to support the referee's finding that the co-owner was liable for all outstanding water and sewer charges. Those expenses should instead be divided equally between the owner and the co-owner.

Outcome
The appeal as to payment of the decedent's liens was dismissed as academic; the interlocutory judgment was modified by deleting the provision that the co-owner was to pay all outstanding water and sewer charges and the value of her use and occupancy of the owner's one-half share of the real property.

Counsel: [***1] Alter and Barbaro, Brooklyn, N.Y. (Stephen V. Barbaro of counsel), for appellant.

Ginsburg & Misk, Queens Village, N.Y. (Hal R. Ginsburg of counsel), for respondent.

Judges: HOWARD MILLER, J.P., WILLIAM F. MASTRO, GABRIEL M. KRAUSMAN, EDWARD D. CARNI, JJ. MILLER, J.P., MASTRO, KRAUSMAN and CARNI, JJ., concur.

Opinion

[*672] [**144] In an action, inter alia, for the partition and sale of real property, the defendant Angela O'Brien appeals, as limited by her brief, from so much of an interlocutory judgment of the Supreme Court, Queens County (Kelly, J.), entered October 18, 2005, as granted the plaintiff's motion to confirm the report of a referee dated June 16,

2005, which determined, inter alia, that upon the sale of the subject real property, (1) she was to pay any outstanding liens against her late husband which a title company would require to be satisfied prior to closing, (2) she was to pay all outstanding water and sewer charges for the real property, and (3) she was to pay to the plaintiff the value of her use and occupancy of the plaintiff's one-half share of the real property, in the amount of $ 4,000 per month, from April 2003 forward, said sums to be paid from her share of the proceeds of [***2] sale.

Ordered that the appeal from so much of the interlocutory judgment as confirmed that part of the referee's report requiring the appellant to pay any outstanding liens of her late husband which a title company would require to be satisfied prior to closing is dismissed as academic; and it is further,

Ordered that the interlocutory judgment is modified, on the [*673] law and the facts, by deleting the provision thereof which confirmed the referee's report in its entirety, and substituting therefor provisions (1) confirming the referee's report except to the extent that it determined that the appellant was to pay (a) all outstanding water and sewer charges for the real property and (b) the [****2] value of her use and occupancy of the plaintiff's one-half share of the real property, in the amount of $ 4,000 [**145] per month from April 2003 forward, and (2) requiring that the plaintiff and the appellant each pay one-half of all outstanding water and sewer charges for the real property; as so modified, the interlocutory judgment is affirmed insofar as reviewed, with costs payable by the plaintiff.

Contrary to the determination of the Supreme Court, the finding of the referee that the appellant should pay [***3] the value of her use and occupancy of the subject real property to the plaintiff was not substantially supported by the record (*see Corsa v Biernacki*, 2 AD3d 388, 389, 767 NYS2d 855 [2003]). While the appellant, a tenant-in-common of the real property with the plaintiff, did occupy the entire premises, that mere occupancy alone did not make her liable to the plaintiff cotenant for her use and occupancy absent an agreement to that effect or an ouster of the plaintiff (*see Jemzura v Jemzura*, 36 NY2d 496, 503, 330 NE2d 414, 369 NYS2d 400 [1975]; *Degliuomini v Degliuomini*, 12 AD3d 634, 635, 785 NYS2d 519 [2004]; *Goldberg v Ochman*, 143 AD2d 255, 258, 532 NYS2d 166 [1988]). The evidence did not support a finding that the appellant ousted the plaintiff or otherwise excluded him from exercising his rights with respect to the real property, nor did the referee make such a determination (*see Corsa v Biernacki*, *supra*). Accordingly, the court should have rejected the referee's finding that the appellant was liable to the plaintiff for the value of her use and occupancy of the premises.

Similarly, the evidence failed to substantially support the referee's finding that the appellant should be held liable for all outstanding water and sewer charges, and these expenses should instead be divided [***4] equally between the plaintiff and the appellant under the circumstances of this case.

The appeal from that portion of the interlocutory judgment which confirmed the referee's finding that the appellant alone should satisfy any liens against her late husband has been rendered academic, since the parties indicated at the oral argument of this matter that the closing on the real property went forward without the need to satisfy any such liens.

The parties' remaining contentions are without merit. Miller, J.P., Mastro, Krausman and Carni, JJ., concur.

Fini v Marini

Supreme Court of New York, Appellate Division, Second Department

September 12, 2018, Decided

2015-10196

Reporter
164 A.D.3d 1218 *; 83 N.Y.S.3d 595 **; 2018 N.Y. App. Div. LEXIS 5989 ***; 2018 NY Slip Op 06003 ****; 2018 WL 4344639

[****1] Tommaso Fini, Respondent-Appellant, v Giulio Marini, Appellant-Respondent. (Index No. 11646/13)

Case Summary

Overview
HOLDINGS: [1]-Defendant was not entitled to summary judgment seeking partition of a lot, which defendant held as tenants in common with plaintiff, his brother-in-law, because defendant did not demonstrate that plaintiff had transferred his interest in the lot to defendant, or that the parties had agreed not to partition lot; [2]-Defendant was not entitled to summary judgment on his adverse possession counterclaim because defendant could not establish that his possession of the lot was under a claim of right, as he did not have a reasonable basis for the belief that the property belonged to him alone, RPAPL 501(3), defendant did not commit acts constituting either an actual or implied ouste, and the required 20-year statutory period had not elapsed when defendant asserted his counterclaim, RPAPL 541.

Outcome
Order affirmed. Order reversed and cross motion for summary judgment granted.

Counsel: [***1] Palmieri Castiglione & Nightingale, P.C., Mineola, NY (Joseph P. Fusco and Vito A. Palmieri of counsel), for appellant-respondent.

Cooper & Paroff, P.C., Kew Gardens, NY (Ira G. Cooper of counsel), for respondent-appellant.

Judges: ALAN D. SCHEINKMAN, P.J., MARK C. DILLON, SYLVIA O. HINDS-RADIX, LINDA CHRISTOPHER, JJ. SCHEINKMAN, P.J., DILLON, HINDS-RADIX and CHRISTOPHER, JJ., concur.

Opinion

[**596] [*1218] In an action for the partition of real property, the defendant appeals, and the plaintiff cross-appeals, from an order of the Supreme Court, Queens County (Denis J. Butler, J.), entered August 10, 2015. The order, insofar as appealed from, denied the defendant's motion for summary judgment dismissing the complaint and on his counterclaims. The order, insofar as cross-appealed from, denied the plaintiff's cross motion for summary judgment on the complaint and dismissing the defendant's counterclaims.

Ordered that the order is affirmed insofar as appealed from; and it is further,

Ordered that the order is reversed insofar as cross-appealed from, on the law, and the plaintiff's cross motion for summary judgment on the complaint and dismissing the defendant's counterclaims is granted; and it is further, [***2]

Ordered that one bill of costs is awarded to the

plaintiff.

In this action for the partition of real property, the parties [*1219] are brothers-in-law and former business partners. In 1970, they purchased a piece of real property in Queens (hereinafter Lot 176) as tenants in common. Thereafter, they used Lot 176 for business purposes. In 1992, the parties decided to sever their business relationship. They entered into an agreement (hereinafter the 1992 agreement) whereby [**597] the plaintiff would sell all of his shares of the capital stock of four corporations to the defendant, said shares constituting all of the plaintiff's right, title, and interest in those corporations. The plaintiff continued working on Lot 176 until he went on disability in 1994.

In 2013, the plaintiff commenced this action for the partition of Lot 176, alleging that he had a present right of possession of the premises and a right to bring this action as the owner of an undivided share in the premises. In his answer, the defendant asserted counterclaims alleging adverse possession and breach of contract, and seeking legal fees. Subsequently, the defendant moved for summary judgment dismissing the complaint and on his counterclaims. [***3] The plaintiff cross-moved for summary judgment on the complaint and dismissing the defendant's counterclaims. The Supreme Court denied the defendant's motion and the plaintiff's cross motion, finding that there were triable issues of fact regarding the ownership interests of the parties in the subject property. The defendant appeals, and the plaintiff cross-appeals.

We agree with the Supreme Court's determination to deny that branch of the defendant's motion which was for summary judgment dismissing the complaint. The defendant failed to establish his prima facie entitlement to judgment as a matter of law dismissing the complaint seeking the partition of Lot 176. The defendant did not demonstrate that the plaintiff had transferred his interest in Lot 176 to the defendant, or that the parties had agreed not to partition Lot 176. Contrary to the defendant's contention, a settlement agreement dated April 25, 2002 (hereinafter 2002 agreement), entered into by the parties to resolve a dispute regarding a parcel of property located in Suffolk County, did not effect a transfer to the defendant of Lot 176, which is located in Queens County. Nowhere in the 2002 agreement, including, but not [***4] limited to, the third "whereas" clause in said agreement, do the parties provide that the plaintiff's entire interest in Lot 176 would be transferred to the defendant. The deed referred to in that part of the 2002 agreement which provides for the transfer of title by delivery of said deed is the deed for the Suffolk County property. Moreover, contrary to the defendant's contention, the mutual [*1220] releases in the 2002 agreement did not act as a bar to the plaintiff's action for partition.

The defendant also failed to establish his prima facie entitlement to judgment as a matter of law on his counterclaim for adverse possession. In order to establish his counterclaim for adverse possession, the defendant was required to prove, by clear and convincing evidence, that his possession of the property was (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required statutory period (*see Sorbi v Fluger*, 126 AD3d 880, 6 NYS3d 95 [2015]; *Chion v Radziul*, 62 AD3d 931, 880 NYS2d 666 [2009]; *Perfito v Einhorn*, 62 AD3d 846, 879 NYS2d 545 [2009]). The defendant could not establish that his possession of Lot 176 was under a claim of right, as he did not have a reasonable basis for the belief that the property belonged to him alone (*see* RPAPL 501 [3]). Even assuming that the defendant had exclusive possession [***5] of Lot 176 and that he paid maintenance expenses on that property, these actions are insufficient to establish a claim of right for purposes of adverse possession as against a cotenant (*see Lindine v Iasenza*, 130 AD3d 1329, 15 NYS3d 248 [2015]; *Loveless Family Trust v Koenig*, 77 AD3d 1447, 909 NYS2d 254 [2010]). RPAPL 541 creates a statutory presumption that a tenant in common in possession holds the [**598] property for the benefit of the cotenant (*see Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 911 NYS2d 157

[2010]; *DeRosa v DeRosa*, 58 AD3d 794, 795, 872 NYS2d 497 [2009]). The presumption ceases only after the expiration of 10 years of exclusive occupancy of such tenant or upon ouster (*see* RPAPL 541; *Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d at 749).

Actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants. Ouster may be implied 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 (*see Myers v Bartholomew*, 91 NY2d 630, 633, 697 NE2d 160, 674 NYS2d 259 [1998]). Here, the defendant did not commit acts constituting either an actual or implied ouster. Absent ouster, the period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession (*see Myers v Bartholomew*, 91 NY2d at 632, 638; *DeRosa v DeRosa*, 58 AD3d at 795). Even assuming that the defendant had exclusive possession of the property after the plaintiff went on disability in 1994, the required 20-year statutory [***6] period had not elapsed when the defendant asserted his counterclaim for adverse possession in his answer on September 26, 2013.

[*1221] The defendant also failed to establish his prima facie entitlement to judgment as a matter of law on his counterclaim alleging breach of contract. The 1992 agreement does not prohibit either party from asserting a cause of action for partition. The defendant claims that the parties had agreed in the 1992 agreement that the plaintiff would transfer his interest in Lot 176 to the defendant, but the agreement does not contain such a provision. The parol evidence rule precluded the evidence submitted by the defendant of a prior or contemporaneous communication during negotiations of an agreement that contradicted, varied, or explained the parties' 1992 written agreement, which is clear and unambiguous in its terms and expresses the parties' entire agreement and intentions (*see Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 60 NYS3d 259 [2017]). Furthermore, the purported agreement for the transfer of the plaintiff's interest in Lot 176 fails to satisfy the statute of frauds. The statute of frauds provides that a contract for the sale of real property, or an interest therein, is void unless the contract or some note or memorandum [***7] thereof, expressing the consideration, is in writing, subscribed by the party to be charged (*see* General Obligations Law § 5-703 [2]; *Educational Ctr. for New Ams., Inc. v 66th Ave. Realty Co.*, 131 AD3d 442, 15 NYS3d 385 [2015]; *Alayoff v Alayoff*, 112 AD3d 564, 976 NYS2d 530 [2013]; *DeMartin v Farina*, 205 AD2d 659, 613 NYS2d 655 [1994]). Here, there is no contract for the sale of any interest in Lot 176 memorialized in writing, so any purported agreement regarding that property is void.

Accordingly, while we agree with the Supreme Court's denial of that branch of the defendant's motion which was for summary judgment on his counterclaims, it should have further granted that branch of the plaintiff's cross motion which was for summary judgment dismissing the counterclaims.

The Supreme Court also should have granted that branch of the plaintiff's cross motion which was for summary judgment on the complaint. A plaintiff establishes his or her right to summary judgment [**599] on a cause of action for partition and sale by demonstrating ownership and right to possession of the property (*see Cadle Co. v Calcador*, 85 AD3d 700, 926 NYS2d 106 [2011]; *Arata v Behling*, 57 AD3d 925, 870 NYS2d 450 [2008]). The plaintiff established his entitlement to summary judgment on the complaint by submitting a duly executed deed conveying to him a one-half interest in Lot 176 as a tenant in common (*see James v James*, 52 AD3d 474, 859 NYS2d 479 [2008]). The defendant failed to raise a triable issue of fact in opposition (*see id.* at 474; *cf. Arata v Behling*, 57 AD3d at 926). Scheinkman, P.J., [***8] Dillon, Hinds-Radix and Christopher, JJ., concur.

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Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC

Supreme Court of New York, Appellate Division, Second Department

November 9, 2010, Decided

2009-08151

Reporter
78 A.D.3d 746 *; 911 N.Y.S.2d 157 **; 2010 N.Y. App. Div. LEXIS 8360 ***; 2010 NY Slip Op 8053 ****

[****1] Bank of America, N.A., as Trustee of the Trust under the Will of Edith Quirk, Respondent, v 414 Midland Avenue Associates, LLC, et al., Appellants, et al., Defendants. (Index No. 26349/08)

Case Summary

Procedural Posture
Plaintiff trustee sued defendants limited liability company (LLC) and mortgagee, seeking to quiet title to the owner's alleged one-third interest in certain property, to be restored to possession, and for damages. The Supreme Court, Westchester County (New York), inter alia, granted the owner's motion to dismiss affirmative defenses and a portion of a counterclaim asserted by the LLC and the mortgagee. The LLC and the mortgagee appealed.

Overview
The LLC and the mortgagee asserted that the trustee was effectively ousted from the subject property by a specific deed of a prior owner, and that the trustee's interest was extinguished by the 10-year statute of limitations, equitable estoppel, and laches. The appellate court found that the trial court properly dismissed the affirmative defenses and the portion of the first counterclaim as asserted that the trustee's interest was extinguished. RPAPL 541 created a statutory presumption that a tenant in common in possession held the property for the benefit of the cotenant. The mere recording of the deed, without any change in possession or notice to the trustee, the allegedly ousted cotenant, was not an ouster, since no change in possession of the property was alleged. The trustee's first actual notice of the conveyance allegedly occurred in 2001. The trustee commenced this action in 2008, within the 10-year limitations period of CPLR 212(a) and RPAPL 501. The LLC and the mortgagee made no allegation that the trustee knew of the conveyance but did nothing.

Outcome
The order was affirmed insofar as appealed from.

Counsel: [***1] Cuddy & Feder LLP, White Plains, N.Y. (Andrew P. Schriever and Anthony P. Luisi of counsel), for appellants.

Kurzman Eisenberg Corbin & Lever, LLP, White Plains, N.Y. (Eric D. Koster and Judith C. Zerden of counsel), for respondent.

Judges: MARK C. DILLON, J.P., ANITA R. FLORIO, DANIEL D. ANGIOLILLO, THOMAS A. DICKERSON, JJ. DILLON, J.P., FLORIO, ANGIOLILLO and DICKERSON, JJ., concur.

Opinion

[*746] [**158] In an action to quiet title to the plaintiff's alleged one-third interest in certain real property, to be restored to possession of the property, and for damages, the defendants 414 Midland Avenue Associates, LLC, and Provident Bank appeal from stated portions of an order of the

Supreme Court, Westchester County (Smith, J.), dated July 16, 2009, which, inter alia, granted those branches of the plaintiff's motion pursuant to CPLR 3211 (b) which were to dismiss their affirmative defenses of ouster, adverse possession, failure to state a cause of action, a defense [*747] founded on documentary evidence, the statute of limitations, laches, waiver, estoppel, unclean hands, and culpable conduct on the part of the plaintiff, and so much of their first counterclaim as asserted that the plaintiff's interest in the [***2] property was extinguished by ouster, the statute of limitations, estoppel, and laches.

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

At issue in this case is whether the appellant 414 Midland Avenue Associates, LLC (hereinafter the LLC), holds a two-thirds interest in the subject property, with the plaintiff, Bank of America, N.A. (hereinafter the trustee), holding the remaining one-third interest. In its complaint, the trustee alleges, inter alia, that it administers a trust created during the life of Edith Quirk, who died on October 27, 1997. Edith Quirk had acquired a one-third undivided interest in the subject property upon the death of her husband, John P. Quirk, in 1995. At that time, Leslie P. Quirk was the owner of an undivided two-thirds interest. In his will, Leslie P. Quirk bequeathed his interest in equal shares to the defendants Corey Kupersmith and Kenneth Kupersmith. By deed dated May 26, 1996, recorded June 11, 1996 (hereinafter the Kupersmith deed), Corey Kupersmith, as executor of Leslie P. Quirk's estate, conveyed Leslie P. Quirk's interest to himself and his brother Kenneth Kupersmith. The Kupersmith deed stated that "ALL" of the property [***3] was being conveyed. In 2007, Kenneth Kupersmith executed a quitclaim deed releasing any interest he had to Corey Kupersmith. In 2008, Corey Kupersmith purported to convey the entire subject property to the LLC, which took out a first mortgage in the principal sum of $840,000 and a second mortgage in the sum of $280,000 from the appellant Provident Bank.

[****2] [**159] On December 2, 2008, the trustee commenced this action, inter alia, to quiet title to its alleged one-third interest in the subject property. In their answer, the appellants asserted affirmative defenses including ouster, adverse possession, failure to state a cause of action, a defense founded on documentary evidence, the statute of limitations, laches, waiver, estoppel, unclean hands, and culpable conduct on the part of the trustee. In their first counterclaim, they seek a judgment declaring that the LLC is the owner of the complete fee interest on the grounds, among other things, that the LLC is a bona fide purchaser for value, the trustee was effectively ousted from the subject property by the Kupersmith deed, and the trustee's interest was extinguished by the applicable 10-year statute of limitations, equitable estoppel, and [***4] laches. In their second [*748] counterclaim pursuant to RPAPL article 15, they seek a judgment quieting title and declaring any interest of the trustee to be void on the ground that the LLC is a bona fide purchaser for value. In support of their counterclaims, the appellants allege that the trustee had constructive notice of its ouster on June 11, 1996, when the Kupersmith deed was recorded, and inquiry notice of the ouster on October 27, 1997, when Edith Quirk died and the property passed to the trust, for which the trustee had a duty to account. They further allege that the trustee had actual notice of the ouster in 2001, when the trustee's attorney became aware of a chain of title containing the Kupersmith deed, yet waited until 2008 to commence this action to quiet title.

The trustee moved to dismiss the affirmative defenses and counterclaims, contending that as a matter of law, the Kupersmith deed did not constitute an ouster because there was no change in possession after that deed was recorded. The Supreme Court, in the order appealed from, inter alia, dismissed the affirmative defenses of ouster, adverse possession, failure to state a cause of action, a defense founded on documentary [***5] evidence, the statute of limitations, laches, waiver, estoppel, unclean hands, and culpable conduct on the part of the trustee, and so much of

the first counterclaim as asserted that the trustee's interest in the property was extinguished by ouster, the statute of limitations, estoppel, and laches. That branch of the trustee's motion which sought dismissal of the second counterclaim alleging that the LLC is a bona fide purchaser for value was denied, and that determination is not challenged on appeal.

In determining a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (7), or, as in this case, a counterclaim, the pleading is afforded a liberal construction, the facts alleged are accepted as true, and the proponent of the pleading is accorded the benefit of every favorable inference (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]; *Cayuga Partners v 150 Grand*, 305 AD2d 527, 759 NYS2d 347 [2003]). Those branches of the trustee's motion which were to dismiss the affirmative defenses were governed by CPLR 3211 (b), which authorizes a plaintiff to make such a motion on grounds that "a defense is not stated or has no merit." The motion is granted if the plaintiff can demonstrate that the "defenses are [***6] without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557-558, 907 NYS2d 255 [2010]). On a motion pursuant to CPLR 3211 (b), the court should apply the same standard as it applies to motions to [*749] dismiss pursuant to CPLR 3211 (a) (7), and the factual assertions will be accepted as true (*see* Siegel, NY Prac § 269, at 449 [4th ed]; *Greco v Christoffersen*, 70 AD3d 769, 771, [**160] 896 NYS2d 363 [2010]). Here, accepting the appellants' allegations as true, the Supreme Court properly dismissed the aforesaid affirmative defenses and so much of their first counterclaim as asserted that the trustee's interest in the property was extinguished by ouster, the statute of limitations, estoppel, and laches.

"Where parties hold property as tenants in common, Real Property Actions and Proceedings Law § 541 creates a statutory presumption that a tenant in common in possession holds the property for the benefit of the cotenant" (*Russo Realty Corp. v Orlando*, 30 AD3d 499, 500, 819 NYS2d 265 [2006]; *see* RPAPL 541). "The presumption ceases only after the expiration of 10 years exclusive occupancy of such tenant or upon ouster" (*Pravato v M.E.F. Bldrs.*, 217 AD2d 654, 655, 629 NYS2d 796 [1995]). [***7] "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" (*Myers v Bartholomew*, 91 NY2d 630, 633, 697 NE2d 160, 674 NYS2d 259 [1998]). The mere recording of a deed, without any change in possession or notice to the allegedly ousted cotenant, does not constitute an ouster (*see Culver v Rhodes*, 87 NY [****3] 348, 353 [1882]; *Goodwin v Nixon*, 15 Misc 3d 1142[A], 841 NYS2d 820, 2007 NY Slip Op 51111[U] [2007]; *Matter of Nazarro*, 7 Misc 3d 1001[A], 801 NYS2d 237, 2005 NY Slip Op 50396[U] [2005]; *cf. Pravato v M.E.F. Bldrs.*, 217 AD2d at 655). Title by adverse possession is acquired when possession is hostile and under claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of 10 years after ouster (*see Walling v Przybylo*, 7 NY3d 228, 232, 851 NE2d 1167, 818 NYS2d 816 [2006]).

Here, contrary to the appellants' contention, the mere recording of the Kupersmith deed on June 11, 1996, did not constitute an ouster of the trustee, since no change [***8] in possession of the property was alleged. The trustee's first actual notice of the conveyance allegedly occurred in 2001. The trustee commenced this action in 2008, within the 10-year statutory limitations period (*see* CPLR 212 [a]; RPAPL 501). The appellants, therefore, failed to adequately allege the defenses of ouster, adverse possession, and statute of limitations and so much of their first counterclaim

as asserted that the plaintiff's interest in the property was extinguished by ouster and the statute of limitations.

Where an owner knows of a defect in title and fails to address [*750] it, laches does not apply unless the facts are sufficient to constitute equitable estoppel (*see Kraker v Roll*, 100 AD2d 424, 433, 474 NYS2d 527 [1984]; *Washington Temple Church of God in Christ, Inc. v Global Props. & Assoc., Inc.*, 15 Misc 3d 1142[A], 841 NYS2d 824, 2007 NY Slip Op 51114[U] [2007], *affd* 55 AD3d 727, 865 NYS2d 641 [2008]). Equitable estoppel arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property and incurs expense in reliance on that belief (*see Andrews v Cohen*, 221 NY 148, 153, 116 NE 862 [1917]). The property owner must "inexcusably" delay in asserting a claim to the property, knowing that "the opposing [***9] party has changed his position to his irreversible detriment" (*Orange & Rockland Utils. v Philwold Estates*, 70 AD2d 338, 343, 421 NYS2d 640 [1979], *mod on other grounds* 52 NY2d 253, 418 NE2d 1310, 437 NYS2d 291 [1981]).

[**161] Here, the appellants alleged that, in 2008, Corey Kupersmith conveyed the entire subject property to the LLC. However, they made no allegation that the trustee knew of this conveyance but did nothing. In addition, the appellants do not make any further allegations concerning the trustee's conduct in support of their affirmative defense of waiver, defined as the voluntary and intentional abandonment of a known right which may not be inferred from mere silence or inaction (*see e.g. Golfo v Kycia Assoc., Inc.*, 45 AD3d 531, 532-533, 845 NYS2d 122 [2007]), or their affirmative defenses of unclean hands and culpable conduct. Accordingly, the appellants failed to adequately allege the affirmative defenses of equitable estoppel, laches, waiver, unclean hands, and culpable conduct, and so much of their first counterclaim as asserted that the plaintiff's interest in the property was extinguished by estoppel and laches (*see Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 907 NYS2d 255 [2010]).

The appellants contend that discovery may reveal facts now unknown to them [***10] which would allow them to plead new facts in support of the legal conclusions they assert. However, where affirmative defenses "merely plead conclusions of law without any supporting facts," the affirmative defenses should be dismissed pursuant to CPLR 3211 (b) (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2008]).

The appellants' remaining contentions are without merit or need not be addressed in light of our determination. Dillon, J.P., Florio, Angiolillo and Dickerson, JJ., concur.

Perretta v. Perretta

Supreme Court of New York, Kings County

June 10, 2014, Decided

28743/11

Reporter
43 Misc. 3d 1232(A) *; 993 N.Y.S.2d 645 **; 2014 N.Y. Misc. LEXIS 2545 ***; 2014 NY Slip Op 50904(U) ****; 2014 WL 2592628

[****1] Louis J. Perretta, ANN-MARIE ALBICOCCO, LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR., Plaintiffs, against Anthony Perretta, JOSEPHINE PERRETTA, and ANNETTE PERRETTA, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Affirmed by, in part, Appeal dismissed by, in part Perretta v. Perretta, 2016 N.Y. App. Div. LEXIS 6716 (N.Y. App. Div. 2d Dep't, Oct. 19, 2016)

Counsel: [***1] For Plaintiff: Randolph White, Esq., White and Wolnerman, PLLC, NY NY.

For Defendant: Domenick Napoletano, Esq., Brooklyn NY.

Judges: HON. ARTHUR M. SCHACK, J. S. C.

Opinion by: ARTHUR M. SCHACK

Opinion

Arthur M. Schack, J.

Plaintiffs LOUIS J. PERRETTA, ANNE-MARIE ALBICOCCO, LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. move for: partial [****2] summary judgment, pursuant to CPLR Rule 3212 (e), directing the partition and sale of the residential subject property at 447 Henry Street, Brooklyn, New York (Block 323, Lot 27, County of Kings); the Court to strike the affirmative defenses of defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA, and ANNETTE PERRETTA; defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA and ANNETTE PERRETTA to provide a complete accounting of revenues, expenses and management of the subject property; and, the appointment of a Referee in furtherance of the foregoing relief. Defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA, and ANNETTE PERRETTA cross-move for: an order granting defendants leave to amend their answer to more particularly plead certain affirmative defenses; adding an additional defense of statute of limitations, pursuant to CPLR Rule 3025 (b); and, dismissal of plaintiffs' third [***2] cause of action against defendants for their use and occupancy of the subject premises, pursuant to CPLR Rule 3211 (a) (7), for failure to state a cause of action.

Background

The subject property was purchased in 1946 by Luigi a/k/a Louis Perretta (Luigi) and Guisseppina Perretta as tenants by the entirety. Luigi and Guisseppina Perretta had four sons - Frank Perretta, Pasquale Perretta, Tiberio Perretta a/k/a Tim

Perretta and defendant ANTHONY PERRETTA. Guisseppina Perretta died on March 12, 1963 and her husband, Luigi, became the sole owner of the property. Luigi died on October 29, 1964. In his August 14, 1963 last will and testament Luigi devised all of his estate, real, personal and mixed, to his four sons. Luigi's will indicated that Frank Perretta, with his family, and ANTHONY PERRETTA were residing in the premises. Luigi suggested in the will that subsequent to his death each son pay $55 per month rent, a profit and loss statement be prepared and any profit or losses be divided equally among the four sons and/or their distributees. Further, Luigi suggested that the property not be sold unless all four sons and/or their distributees unanimously agree to do so, but stressed that [***3] such provision is "merely a suggestion" and that if any of his sons elect not to follow his suggestion, then "the laws and statutes governing tenancies in common shall be applicable."

Frank Perretta had three children - plaintiffs LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. Pasquale Perretta had two children - plaintiffs LOUIS J. PERRETTA, and ANN-MARIE ALBICOCCO. Defendant

ANTHONY PERRETTA had two daughters - defendants JOSEPHINE PERRETTA and ANNETTE PERRETTA. Tiberio Perretta and his wife Angelina Perretta did not have any children. Prior to Luigi's death, his sons' Pasquale Perretta and Tiberio Perretta moved from the premises. As mentioned in Luigi's will, Frank Perretta and his family returned to reside in the premises to provide companionship to Luigi, prior to Luigi's death. In 1971, Frank Perretta and his family moved again from the subject property, to [****3] Staten Island. Defendant ANTHONY PERRETTA continued to reside at the property, with his two daughters, defendants JOSEPHINE PERRETTA and ANNETTE PERRETTA, to the present.

Frank Perretta, on September 3, 1993, transferred his one-quarter interest in the property to his brothers, Pasquale Perretta, Tiberio Perretta [***4] and ANTHONY PERRETTA. Thus, Pasquale Perretta, Tiberio Perretta and ANTHONY PERRETTA each became one-third owners of the premises as tenants in common. Tiberio Perretta moved into an apartment in the premises with his wife, Angelina. They died in 2008 and 2009 respectively. Angelina Perretta, prior to her death, transferred her one-third interest in the property, which she inherited from her deceased husband, Tiberio Perretta, to an irrevocable *inter vivos* trust, with her nephews LOUIS A. PERRETTA and Anthony Curto as trustees. Angelina Perretta's trust instrument specified that upon her death, the trustees shall transfer her interest in the subject property to Frank Perretta's children, LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. Subsequent to Angelina Perretta's death, LOUIS A. PERRETTA and Anthony Curto, as trustees, conveyed Angelina Perretta's one-third interest in the property to LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. by quitclaim deed, dated August 6, 2009. Upon Pasquale Perretta's death, on November 9, 2009, his one-third interest in the property passed to his children, LOUIS J. PERRETTA and ANN-MARIE ALBICOCCO. Therefore, at present, a [***5] one-third interest in the property is held each by: plaintiffs LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. (the "Frank descendant plaintiffs"); plaintiffs LOUIS J. PERRETTA and ANN-MARIE ALBICOCCO (the "Pasquale descendant plaintiffs"); and, defendant ANTHONY PERRETTA. They are tenants in common. According to plaintiff LOUIS J. PERRETTA's affidavit in support of plaintiffs' motion, the Frank descendant plaintiffs and Pasquale descendant plaintiffs attempted to negotiate with defendant ANTHONY PERRETTA and his daughters to resolve the controversy over the use of and distribution of profits and expenses of the premises. The plaintiffs suggested, among other things: forming a limited liability company to centralize control; requiring each owner to pay his/her proportionate share of expenses and share

equally in the profits; requiring ANTHONY PERRETTA, who occupies the garden apartment with his daughters, to pay the costs of occupancy and his adult daughter defendants JOSEPHINE PERRETTA and ANNETTE PERRETTA to pay rent; allowing the absentee owners, the Frank descendent plaintiffs and the Pasquale descendant defendants, to share in the management of the property and be [***6] given a full accounting. These suggestions, in addition to proposals to sell the premises, were rejected by defendants. Plaintiffs then retained counsel and the instant partition action ensued.

Discussion

First, the branch of defendants' cross-motion to amend their answer is granted. "In the absence of prejudice or surprise to the opposing party, leave to amend an answer to assert an affirmative defense should be freely given where the proposed amendment is neither palpably insufficient nor patently devoid of merit (*see* CPLR 3025 [b]; *Tomasino v American Tobacco Co*., 57 AD3d 652, 653, 871 N.Y.S.2d 180 [2d Dept 2008]; *Matter of Roberts v Borg*, 35 AD3d 617, 618, 826 N.Y.S.2d 409 [2d Dept 2006])." (*Carroll v Motola*, 109 AD3d 629, 630, 970 N.Y.S.2d 820 [2d Dept 2013]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." (*Sample v Levada*, 8 AD3d 465, 467-468, 779 N.Y.S.2d 96 [2d Dept 2004]). (*See Carroll v Motola* at 630; *Maldonado v Newport Gardens, Inc*., 91 AD3d 731, 732, 937 N.Y.S.2d 260 [2d Dept 2012]; *Vista Props., LLC v Rockland Ear, Nose & Throat Assoc., P.C*., 60 AD3d 846, 847, 875 N.Y.S.2d 248 [2d Dept 2009]). Defendants' proposed amendments, which amplify certain affirmative [***7] defenses and add an affirmative defense of statute of limitations with respect to plaintiffs' third cause of action for use and occupancy are palpably neither insufficient nor devoid of merit. Moreover, plaintiffs have not shown that they will be prejudiced by the amendments.

Next, "[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])." (*Galitskaya v Presman*, 92 AD3d 637, 937 N.Y.S.2d 878 [2d Dept 2010]). "A plaintiff establishes his or her right to summary judgment on an action for partition and sale by demonstrating ownership and right to possession of the property (*see Arata v Behling*, 57 AD3d 925, 926, 870 N.Y.S.2d 450 [2d Dept 2008]; *James v James*, 52 AD3d 474, 859 N.Y.S.2d 479 [2d Dept 2008]; *Dalmacy v Joseph*, 297 AD2d 329, 330, 746 N.Y.S.2d 312 [2d Dept 2002])." (*Cadle Co. v Calcador*, 85 AD3d 700, 702, 926 N.Y.S.2d 106 [2d Dept 2011]). Plaintiffs, in the instant action, make a *prima facie* [***8] showing by submitting evidence which establishes their ownership interests in the subject property.

Defendants do not dispute the ownership interest of the Pasquale descendant plaintiffs. With respect to their challenge to the interests of the Frank descendant plaintiffs, defendants' counsel states in his affirmation in opposition, in ¶ 22, that:

Other than the typed recitation of Anthony Curto and Louis

> A. Perretta [in the quitclaim deed] as grantors and Trustees of the Perretta Family Trust, the signatures placed thereon by them and the acknowledgment taken of them, fails to identify the capacity by which said deed was issued. Instead their signatures are bare of any authority or capacity and rather appear as if they personally were the grantor owners which they were not.

However, defendants' counsel fails to cite any legal authority holding or suggesting that the failure of a deed signatory to note his or her capacity in the signature, where such is recited elsewhere in the

deed, renders the conveyance invalid. There is no further contention in defendants' opposition papers or evidence provided to establish that the [****4] *inter vivos* trust by which Angelina Perretta's interest in the property [***9] was transferred was infirm due to lack of capacity or for any other reason. Accordingly, plaintiffs have established entitlement to summary judgment for partition of the subject property. Further, plaintiffs are entitled to an accounting, a necessary incident of a partition action. (*McCormick v Pickert*, 51 AD3d 1109, 856 N.Y.S.2d 306 [3d Dept 2008]; *Wong v Chi-Kay Cheung*, 46 AD3d 1322, 847 N.Y.S.2d 793 [3d Dept 2007]; *Donlon v Diamico*, 33 AD3d 841, 842, 823 N.Y.S.2d 483 [2d Dept 2006]).

To establish a *prima facie* case for sale, it must be established that the property is "so circumstanced that a partition thereof cannot be made without great prejudice to the owners." (*Cadle Co. v Calcador*, 85 A.D.3d at 702 quoting *Chittenden v Gates*, 18 AD 169, 173, 45 N.Y.S. 768 [2d Dept 1897]). (*See Shui Ying Lee v Jing Ting Lee*, 79 AD3d 1123, 913 N.Y.S.2d 563 [2d Dept 2010]). "The actual physical partition of property is the preferred method and is presumed appropriate unless one party demonstrates that actual physical partition would cause great prejudice." (*Lauriello v Gallotta*, 70 AD3d 1009, 1010, 895 N.Y.S.2d 495 [2d Dept 2010]). The parties dispute whether a sale is warranted. The subject property, a four-family building, could be converted into separate condominium units. According to defendants, conversion [***10] into condominium units would significantly increase the value of the property. Presumably, the conversion of the premises into condominium units will further allow defendants to retain possession of the garden apartment. These issues will properly be before a Referee who will report to the Court whether partition may be had without great prejudice. "Whether physical partition or sale is appropriate is a question of fact for the Referee to resolve." (*Hales v Ross*, 89 AD3d 1261, 1263, 932 N.Y.S.2d 263 [3d Dept 2011]). (S*ee Lauriello v Gallotta* at 1010).Therefore, a Referee will be appointed to hear and report on, among other issues, whether the property is so circumstanced that a partition cannot be made without great prejudice to the owners, pursuant to RPAPL § 901 (1). Pending a Referee's Report, plaintiffs are not entitled to use and occupancy from defendants. "Mere occupancy alone by a tenant in common does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see Misk v Moss*, 41 AD3d 672, 839 N.Y.S.2d 143 [2d Dept 2007]; *Degliuomini v Degliuomini*, 12 AD3d 634, 785 N.Y.S.2d 519 [2d Dept 2004])." (*McIntosh v McIntosh*, 58 AD3d 814, 872 N.Y.S.2d 490 [2d Dept 2009]). "Although actual ouster [***11] 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." (*Myers v Bartholomew*, 91 NY2d 630, 633, 697 N.E.2d 160, 674 N.Y.S.2d 259 [1998]). "To prove an ouster it is not necessary to prove a violent ejectment, or as one of the cases has it, it is not necessary to prove the party was set out by the shoulders. It may be inferred from the circumstances." (*Zapp v Miller*, 109 NY 51, 58, 15 N.E. 889, 14 N.Y. St. 77 [1888]). There must be some evidence or circumstances that amount to an "ouster." The Court finds that no such circumstances exist in the instant action. It is undisputed that Frank Perretta and Pasquale Perretta [****5] voluntarily relocated from the property. There is no allegation that any of the plaintiffs attempted to access or use any part of the subject property and were prevented from doing so by defendants. Plaintiffs' allegation that defendants refused to come to terms with them regarding a management plan for the property, [***12] without more, is not an "ouster."

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiffs LOUIS J. PERRETTA, ANNE-MARIE ALBICOCCO, LOUIS A. PERRETTA, JOSEPHINE HYDOCK and FRANK PERRETTA, JR. for: partial summary judgment, pursuant to CPLR Rule 3212 (e), directing the partition and sale of the residential subject property at 447 Henry Street, Brooklyn, New York (Block 323, Lot 27, County of Kings); striking the affirmative defenses of defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA, and ANNETTE PERRETTA; defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA and ANNETTE PERRETTA to provide a complete accounting of revenues, expenses and management of the subject property; and, appointing of a Referee in furtherance of the foregoing relief, is granted; and it is further

ORDERED, that the cross-motion of defendants ANTHONY PERRETTA, JOSEPHINE PERRETTA, and ANNETTE PERRETTA for: an order granting defendants leave to amend their answer to more particularly plead certain affirmative defenses; adding an additional defense of statute of limitations, pursuant to CPLR Rule 3025 (b); and, dismissal of plaintiffs' third cause of action against defendants for their use and occupancy of the subject [***13] premises, is granted; and it is further

ORDERED, that in the Order to be Settled on Notice, there shall be a provision for the appointment of a Referee to hear and report: on the right, share or interest of each party in the property, as far as the same has been ascertained, pursuant to RPAPL § 915; whether the property is so circumstanced that a partition cannot be made without great prejudice to the owners, pursuant to RPAPL § 901 (1); if a sale of the property is necessary, ascertain the existence of any creditor not joined as a party who may have a lien against an undivided share of any party, pursuant to RPAPL § 913; and, with respect to an accounting of the sums paid and collected, including but not limited to rents, expenses, interests of creditors and the parties' contributions and withdrawals from the subject property. Plaintiffs' counsel shall Settle Order on Notice within thirty days after serving notice of entry.

ENTER

HON. ARTHUR M. SCHACK

J. S. C.

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Saltalamacchia v. Miceli

Supreme Court of New York, Suffolk County

July 17, 2013, Decided

09-25258

Reporter
2013 N.Y. Misc. LEXIS 3263 *; 2013 NY Slip Op 31688(U) **

[**1] DONNA SALTALAMACCHIA, as Executrix of the Estate of ELEANOR MORAN, Plaintiff, - against - ROBERT MICELI, Defendant. INDEX No. 09-25258

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: [*1] For Plaintiff: JOANNE FANIZZA, ESQ., Farmingdale, New York.

For Defendant: CARMAN, CALLAHAN & INGHAM, LLP, Farmingdale, New York; Howard Bergson, Esq., Referee, Setauket, New York.

Judges: PRESENT: Hon. JOSEPH FARNETI, Acting Justice Supreme Court.

Opinion by: JOSEPH FARNETI

Opinion

ORDERED that the motion by plaintiff pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.44 to reject the Referee's report is determined herein; and it is further

ORDERED that plaintiff is to provide the Referee with certified search results for creditors pursuant to RPAPL 913 (1) within thirty (30) days of the entry date of this Order.

This is an action for partition of real property known as 9 Poplar Court, Miller Place, New York owned by plaintiff and defendant, her son, as joint tenants with right of survivorship. The property was purchased in October 2005 and is improved by a single-family residence. By Order of this Court dated April 7, 2011, plaintiff's unopposed motion for partial summary judgment was granted to the extent of granting partition in accordance with a reference to ascertain the rights, shares and interests of the parties in the property. The Order of reference dated July 14, 2011, appointed Howard M. Bergson, [*2] Esq. as [**2] Referee. The hearing before the Referee occurred on January 6, 2012, after which the Referee rendered his report.

Plaintiff seeks to reject the report of the Referee on the grounds that some of the facts recited by the Referee do not comport with the parties' sworn deposition and hearing testimony and that the incorrect law was applied to this action. She asserts that the agreement of the parties provided that the children of defendant's companion were not to reside in the house, plaintiff was to have a place to reside expense-free for the rest of her life and defendant, her nurse-son, would provide her necessary end-of-life care. Plaintiff claims that she was not ousted as characterized by the Referee in his report, but instead was constructively evicted or underwent an "implied ouster" through a toxic living environment created by the behavior of defendant's companion, who resided with the parties with defendant's permission. Plaintiff refers to alleged statements by defendant's companion that she wished plaintiff were dead and would see her dead, which caused plaintiff to fear for her life,

to have strokes and to leave the premises in order to protect her health. In addition, [*3] plaintiff asserts that based on the foregoing there is no support to the Referee's claim that there was no testimony or evidence to support the conclusion that it was unsafe or improper for plaintiff to continue to reside in the garage-apartment or that plaintiff was forced to leave the premises.

Plaintiff also asserts that she did not unconditionally give the house to her son as a gift and even if it were a transfer in consideration of the parties' agreement as characterized by the Referee, defendant breached the agreement at the outset by failing to make the first five mortgage payments, to pay for the septic tank replacement, and to ensure that plaintiff had a safe place to live. Plaintiff argues that the "gift" issue was decided by the Order granting her unopposed motion for partial summary judgment. Plaintiff further asserts that the Referee failed to cite any case law in his report to support his position on the issues that he addressed or his conclusions, and that the law supports plaintiff's claims, including her entitlement to the full amount of all the monies that she paid for the house comprising of the full down payment, closing costs, the five mortgage payments, the costs [*4] of renovations and repairs, and rents owed from defendant and rents paid by plaintiff due to her constructive eviction or implied ouster. Finally, plaintiff argues that publication to ascertain creditors pursuant to RPAPL 913 is unnecessary given that plaintiff was authorized during a pre-trial conference on October 20, 2011, to order a title search, which plaintiff has done. In support of her motion, plaintiff submits the Order of reference, the Referee's report, the transcript of the hearing before the Referee, and the deposition transcripts of the parties.

Defendant submits an affirmation in opposition asserting that the Referee properly determined the rights of the parties in all respects.

"Partition, although statutory (RPAPL 9), is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale" (***Freigang v Freigang***, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (*see* ***Worthing v Cossar***, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). These include acquisition payments, such [*5] as down payments and mortgage payments (*see* ***Quattrone v Quattrone***, 210 AD2d 306, 307, 619 NYS2d 773 [2d Dept 1994]; ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893 [3d Dept [**3] 1973]; *see also* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property, if they were made in good faith and are of substantial benefit to the premises (*see* ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see* ***McIntosh v McIntosh***, 58 AD3d 814, 872 NYS2d 490 [2d Dept 2009]; ***Misk v Moss***, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]).

"The decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court" (*see* CPLR 4319). The Court may confirm or reject the referee's report, in whole or in part, and make new findings (*see* CPLR 4403; ***Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp***., 270 AD2d 303, 704 NYS2d 613 [2d Dept 2000]). The report and recommendations of a referee should be confirmed if the findings are supported [*6] by the record (*see* ***MacNiallias v Potter***, 82 AD3d 718, 917 NYS2d 895 [2d Dept 2011]; ***Ferentini v Ferentini***, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]; ***Capili v Ilagan***, 26 AD3d 354, 810 NYS2d 480 [2d Dept 2006]).

Although plaintiff now challenges the Referee's use of the term "ouster," it is notable that the Referee expressly stated at the hearing on January 6, 2012, that there were two issues to be resolved, one of

which was whether or not there was an ouster of plaintiff from the premises, and plaintiff's attorney never disputed the use of the term "ouster" at the hearing and instead stated that "my concern is I want the record to be clear on the matter of ouster" and agreed on the record with the Referee's statement that "the act of oustering [sic] ended on or about the time she [plaintiff] moved out." Plaintiff cannot now raise new issues of whether plaintiff was constructively evicted or was the subject of an implied ouster, which were not raised or addressed at the hearing. In addition, plaintiff's hearing testimony reveals that it was plaintiff who initially verbally confronted defendant's companion, telling her that she would have to move out because it was plaintiff's house, [*7] during the incident in which defendant's companion allegedly responded that she wished plaintiff were dead, and that this incident and others arose out of plaintiff's perception that defendant's companion was not warm to her and resented her and that plaintiff was not being informed of, invited to, or included in events involving her granddaughter or family and that defendant's companion was the cause of this exclusion. A review of the hearing testimony as well as the deposition testimony supports the Referee's findings that "[t]he personal disputes, the arguments, the name calling and the perceived slights testified to by the plaintiff do not rise to the level that would support a conclusion of an 'ouster'" and that "there was no testimony or evidence that would support a conclusion that it was unsafe or improper for the plaintiff to continue to reside in the apartment or that the plaintiff was forced to leave" (*compare* ***H & Y Realty Co. v Baron***, 193 AD2d 429, 597 NYS2d 343 [1st Dept 1993]; ***Johnston v Martin***, 183 AD2d 1019, 583 NYS2d 615 [3d Dept 1992]).

Moreover, the Referee determined that plaintiff's payment of the $400,000.00 down payment, the closing costs of the home, and the [*8] approximately $13,500.00 cost of renovating the garage-apartment's kitchen were not gifts but rather transfers in consideration of the oral agreement between the parties that plaintiff would reside in the garage-apartment for the rest of her life and promises made and obligations assumed by defendant, including his payment of the five mortgage payments and the cost of the cesspool repair. Plaintiff claims that defendant breached the oral agreement at the outset by failing to make said [**4] mortgage payments or to pay the cesspool repair cost, and seeks full reimbursement of the down payment, closing costs and renovation costs.

Essentially, consideration "consists of either a benefit to the promisor or a detriment to the promisee" (***Weiner v McGraw-Hill, Inc***., 57 NY2d 458, 464, 443 N.E.2d 441, 457 NYS2d 193 [1982]), which has been bargained for by the parties to the contract (*see* ***Payne v Connelly***, 32 AD2d 693, 299 NYS2d 1013 [3d Dept 1969]; Restatement [Second] of Contracts § 71). "Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny" (***Apfel v Prudential-Bache Sec***, 81 NY2d 470, 476, 616 N.E.2d 1095, 600 NYS2d 433 [1993] [citation omitted]; *see* ***Janian v Barnes***, 294 AD2d 787, 789, 742 NYS2d 445 [3d Dept 2002]). [*9] However, an agreement cannot be said to be supported by any consideration unless "something of 'real value in the eye of the law' was exchanged" (***Apfel v Prudential-Bache Sec***, *supra* at 476, 600 NYS2d 433 [citation omitted]; *see* ***Von Bing v Mangione***, 309 AD2d 1038, 1040, 766 NYS2d 131 [3d Dept 2003]).

Where parties enter into an oral agreement, their obligations may be determined based upon the evidence, including their course of conduct (*see* ***Bubba Gump Fish & Chips Corp. v Morris***, 90 AD3d 592, 933 NYS2d 723 [2d Dept 2011]; ***Czernicki v Lawniczak***, 74 AD3d 1121, 904 NYS2d 127 [2d Dept 2010]). Defendant did breach the oral agreement to the extent that he did not make his obligatory payments. However, defendant did not breach the agreement to the extent that plaintiff will not be residing in the apartment for the rest of her life (*compare* ***Johnston v Martin***, 183 AD2d 1019, 583 NYS2d 615). Plaintiff did not merely live rent-free on the promise that she would

receive a life estate but actually became co-owner of the premises with right of survivorship in return for her financial assistance (*compare id*.). Thus, there was no initial breach of the agreement requiring reimbursement of her financial [*10] assistance inasmuch as plaintiff obtained a survivorship interest in the premises upon payment of the down payment and the closing costs. Moreover, there is no evidence that the parties contemplated or agreed to the reimbursement by defendant of any portion of the clown payment, closing costs and renovation costs paid by plaintiff on his behalf (*compare* ***Czernicki v Lawniczak***, 74 AD3d 1121, 904 NYS2d 127). Plaintiff's Estate is entitled to recover the payments that plaintiff made to cover defendant's obligation for the five mortgage payments and the cost of the cesspool repair that defendant failed to satisfy (*see e.g.* ***Lerner v Ayervais***, 66 AD3d 644, 886 NYS2d 498 [2d Dept 2009]). Thus, the portions of the Referee's report concerning the nature of the agreement between the parties, the issue of ouster, the partition and sale of the premises, the division of the net proceeds of the sale, defendant's reimbursement of the five mortgage payments and the costs of the cesspool repair, and defendant's accounting and payment of an amount equal to the rental received from the time plaintiff vacated the premises to the time of the sale are all supported by the record (*see* ***MacNiallias v Potter***, 82 AD3d 718, 917 NYS2d 895; [*11] ***Ferentini v Ferentini***, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]). The Court confirms said portions of the Referee's report.

However, plaintiff is correct in her assertion that publication to ascertain creditors pursuant to RPAPL 913 is not required by the Court in this matter. The scope of a referee's duties are defined by the Order of reference (*see* CPLR 4311; ***First Data Merch. Services Corp. v One Solution Corp***., 14 AD3d 534, 789 NYS2d 198 [2d Dept 2005]; ***Fidelity New York FSB v Madden***, 228 AD2d 473, 643 NYS2d 1020 [2d Dept 1996]).

[**5] RPAPL 913 (2) provides:

> 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 [*12] 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.

The Order of reference submitted herein merely directs the Referee "to ascertain the interest of creditors who may have liens on the undivided shares of the parties in the subject property" but does not direct the Referee to cause notice to be published. The Referee has not been authorized by the Court to have notice published to ascertain the interest of creditors (*see* RPAPL 913; ***First Data Merch. Services Corp. v One Solution Corp***., 14 AD3d 534, 535, 789 NYS2d 198). The Referee noted in his report that the parties had obtained a title report which, he was informed, did not disclose the existence of any liens. "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" (RPAPL 913 [1]). Inasmuch as plaintiff represents to the Court that she has the results of a [*13] title search indicating the absence of any creditors with liens on the property, plaintiff is directed to provide the Referee with certified search results for creditors pursuant to RPAPL 913(1) within thirty (30) days of the entry date of this Order. Therefore, under the circumstances

presented, the portion of the Referee's report indicating that the language of RPAPL 913 (2) is mandatory and that upon the designation by the Court of a Suffolk County newspaper, the appropriate notice must be published is rejected (*see* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175).

Dated: July 17, 2013

/s/ Joseph Farneti

Hon. Joseph Farneti

Acting Justice Supreme Court

Gendler v Guendler

Supreme Court of New York, Appellate Division, Second Department

July 3, 2019, Decided

2017-08692

Reporter
174 A.D.3d 507 *; 107 N.Y.S.3d 300 **; 2019 N.Y. App. Div. LEXIS 5393 ***; 2019 NY Slip Op 05389 ****; 2019 WL 2844243

[****1] Natalya Gendler, Respondent, v Semen Guendler, Appellant. (Index No. 11055/14)

Case Summary

Overview

HOLDINGS: [1]-The trial court properly directed the former husband to pay the former wife $ 47,967.67 in consideration of his exclusive use and occupancy of the home because the wife testified that the locks to the house and garage were changed, a lock had been placed on the mailbox in January or February 2013, and the husband would not allow her access to the home; [2]-The husband's claim for a credit was barred by the statute of frauds, General Obligations Law § 5-703(1), because there was no written contract between the parties memorializing the alleged verbal agreement wherein the wife agreed to transfer her share of the home to the husband in exchange for $140,000; the doctrine of part performance did not apply because the husband's actions of giving the wife $100,000 prior to their divorce were not unintelligible or extraordinary without reference to the alleged agreement.

Outcome

Judgment affirmed.

Counsel: [***1] Sinayskaya Yuniver, P.C., Brooklyn, NY (Steven R. Yuniver of counsel), for appellant.

Galina Feldman, P.C., Brooklyn, NY (Philip Gurevich of counsel), for respondent.

Judges: RUTH C. BALKIN, J.P., JEFFREY A. COHEN, ROBERT J. MILLER, BETSY BARROS, JJ. BALKIN, J.P., COHEN, MILLER and BARROS, JJ., concur.

Opinion

[**301] [*508] In an action, inter alia, to partition real property, the defendant appeals from a judgment of the Supreme Court, Nassau County (Jack L. Libert, J.), dated June 8, 2017. The judgment, insofar as appealed from, after a nonjury trial, is in favor of the plaintiff and against the defendant in the total sum of $211,217.67.

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

The plaintiff and the defendant were married in June 1997. The parties purchased a home in Valley Stream (hereinafter the home) in September 1997. The defendant filed for a divorce in Russia in November 2012 and was awarded a divorce in December 2012. The parties lived together in the home until January or February 2013. When the plaintiff returned from a trip to Russia in January or February 2013, she found that the locks at the home had been changed.

In November 2014, the plaintiff commenced [***2] this action, inter alia, to

partition the home. The complaint alleged that the defendant was in possession of the home and that he had refused to (1) allow the plaintiff access to the home, (2) return the plaintiff's belongings that are in the home, and (3) give the plaintiff an equitable share of the value of the home. The action proceeded to a nonjury trial, at which the parties were the only witnesses. The parties agreed that the defendant would purchase the plaintiff's interest in the home, with the purchase price to be determined by an appraisal. Accordingly, the only issue to be determined at the trial was the distribution of the funds.

After the nonjury trial, the Supreme Court directed the defendant to pay the plaintiff $163,250, which represented her 50% interest in the home minus half of the principal balance due on two home equity lines of credit. The court further directed the defendant to pay the plaintiff $47,967.67 in consideration of his exclusive use and occupancy of the home beginning on February 1, 2013.

We agree with the Supreme Court's determination to direct the defendant to pay the plaintiff $47,967.67 in consideration of his exclusive use and occupancy of the [***3] home, as the plaintiff presented evidence that the defendant ousted her from the home (*see Myers v Bartholomew*, 91 NY2d 630, 633, 697 NE2d 160, 674 NYS2d 259 [1998] [****2] ; *McIntosh v McIntosh*, 58 AD3d 814, 872 NYS2d 490 [2009]). The plaintiff testified that the locks to the house and garage were changed and that a lock had been placed on the mailbox in January or February 2013. The plaintiff further testified that the defendant [**302] would [*509] not allow her access to the home. When she reported the situation to law enforcement, she was told that she would need to get a court order to access the home. The defendant admitted that his son changed the locks to the home and garage, but denied ever telling the plaintiff that she could not have access to the home. However, the defendant's attorney conceded that there was no dispute that the plaintiff did not have access to the home since January 2013.

The defendant argues that the Supreme Court should have credited him $100,000 in light of his prior payments to the plaintiff in exchange for her share of the value of the home. The defendant testified that he and the plaintiff entered into a verbal agreement wherein the plaintiff agreed to transfer her share of the home to him in exchange for $140,000. The defendant offered into evidence two checks [***4] payable from him to the plaintiff in the sum of $50,000 each, dated May 2, 2011, and May 10, 2011, respectively. The court rejected the defendant's claim as barred by the statute of frauds.

"The statute of frauds prohibits the conveyance of real property without a written contract" (*Pinkava v Yurkiw*, 64 AD3d 690, 692, 882 NYS2d 687 [2009]; *see* General Obligations Law § 5-703 [1]). "While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance, the claimed partial performance must be unequivocally referable to the agreement" (*Pinkava v Yurkiw*, 64 AD3d at 692 [citation and internal quotation marks omitted]; *see* General Obligations Law § 5-703 [4]; *Alayoff v Alayoff*, 112 AD3d 564, 566, 976 NYS2d 530 [2013]). "It is insufficient that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement" (*Alayoff v Alayoff*, 112 AD3d at 566 [internal quotation marks and citations omitted]; *see Anostario v Vicinanzo*, 59 NY2d 662, 664, 450 NE2d 215, 463 NYS2d 409 [1983]).

We agree with the Supreme Court's determination that the defendant's claim is barred by the statute of frauds, as there was no written contract between the parties (*see* General Obligations Law § 5-703 [1]; *Pinkava v Yurkiw*, 64 AD3d at 692). Contrary to the defendant's contention, the doctrine of part performance is inapplicable here. Although the defendant presented evidence that he gave the plaintiff $100,000 in May 2011, prior [***5] to their divorce, these actions are not unintelligible or

extraordinary without reference to the alleged agreement (*see Anostario v Vicinanzo*, 59 NY2d at 664; *Alayoff v Alayoff*, 112 AD3d at 566).

[*510] The defendant's remaining contentions are without merit. Balkin, J.P., Cohen, Miller and Barros, JJ., concur.

Messina v. Mayer

Supreme Court of New York, Suffolk County

April 14, 2015, Decided; May 13, 2015, Published

6094/2014

Reporter
2015 NYLJ LEXIS 2079 *

Messina v. Mayer, 6094/2014

(Messina v. Mayer, 6094/2014, NYLJ, May. 13, 2015 at Pg. 31)

Judges: [*1] Justice Andrew Tarantino, Jr.,

Opinion

Messina v. Mayer, 6094/2014

COURT: Suffolk County

CASE NUMBER: 6094/2014

Cite as: Messina v. Mayer, 6094/2014, NYLJ 1202726157440, at *1 (Sup., SUF, Decided April 14, 2015)

Supreme Court, Suffolk County, Part 50

CASENAME

Andrew Messina, Plaintiff(s) v. Kent Mayer Defendant(s)

6094/2014

Decided: April 14, 2015

ATTORNEYS

Attorney for Plaintiff: Karen Gunkel Esq, Bellport NY.

Attorney for Defendant: Irwin S. Izen, Esq., Commack NY.

DECISION AND ORDER AFTER TRIAL WITHOUT JURY

PROCEDURAL HISTORY

*1

This action was commenced by Plaintiff ANDREW MESSINA [hereinafter MESSINA] sounding in an action for Partition. At the time this action appeared in this Court, neither MESSINA nor Defendant KENT MAYER [hereinafter MAYER] was residing at the subject premises. Prior to this action, both MESSINA and MAYER obtained Family Court Article 8 Orders of Protection directing that each was to stay away from the premises and each other. On April 29, 2014, after conferencing with counsel, it was agreed that MESSINA would be permitted back to the premises. Before modifying the Family Court Orders, this Court transferred the Family Court Article 8 proceedings to this Court. On May 8, 2014, this [*2] Court vacated the Family Court Orders of Protection, and re-issued temporary orders of protection from Supreme Court. On June 9, 2014, on consent of MESSINA and MAYER, with counsel present, the Orders of Protection were modified, made permanent (without admission of wrong-doing), and the parties were directed to stay away from each other, and directed to refrain from certain conduct. After permitting time for real estate appraisals, and completion of other discovery, a trial without jury was conducted over three days, beginning October

20, 2014, and concluding December 1, 2014. The Court reserved decision.

TESTIMONY

MESSINA testified first. With marriage plans in the future, he explained that he and MAYER purchased the property in May 2013. Prior to that date MESSINA and MAYER lived together for approximately three years equally sharing all expenses. The subject property was purchased with both names on the deed with rights of survivorship. Accordingly, the mortgage was taken under both names. However, because of MAYER's credit and finance issues, the note was only in MESSINA's name. According to MESSINA, the parties agreed to share expenses "down the center". MESSINA and MAYER each [*3] contribute

*2

$5,000.00 to the $10,000.00 down payment. For the purposes of trial, the parties stipulated that each paid $14,250.00 towards the down payment and closing costs of the subject property. The purchase price was $288,000.00, with a $270,000 mortgage. Based on the property appraisal obtained by MESSINA on June 1, 2014, the subject property was appraised at $280,000.00. After reviewing each other's real estate appraisals, the parties stipulated that the value of the premises, for the purposes of trial, was $291,500.00.

The subject premises included an accessory apartment which the parties agreed to renovate. The first tenant took possession on September 1, 2013, with a monthly rent of $1,400.00. The parties opened up a joint account to pay the mortgage and housing expenses. The first mortgage payment was due on June 1, 2013, in the amount of $2,500.00. MESSINA submitted into evidence statements reflecting that from June 2013, through May 2014, he personally paid the $2,500.00 mortgage payment with no contribution from MAYER. MESSINA also paid the oil, utilities, and landscaping costs. MESSINA compiled and maintained a binder of all of the purchases and housing expenses because [*4] he expected MEYER would eventually contribute his one-half share. According to MESSINA's tally, MAYER owes one half of approximately $15,200.00.

MESSINA described the deterioration of the relationship which accelerated with apparent physical altercations between September and October 2013. Up until that point the parties were residing together. MESSINA claimed that he never demanded that MAYER leave the premises, and that MAYER left voluntarily. When MAYER returned on October 31, 2013 to remove items from the premises, the police were called. MESSINA was at work and after he arrived at the house, an altercation occurred. MESSINA then obtained the temporary order of protection from the Family Court. MAYER was directed to stay away from the premises. In March 2014, MAYER obtained an order of protection against MESSINA, directing MESSINA to stay away from the premises. MESSINA then described this Court's modification of the Orders which permitted him access to the premises.

On cross-examination, MESSINA acknowledged that the agreement to equally share the expenses was not reduced to writing. According to MESSINA, he found the house although MAYER had access as a real estate agent. After [*5] closing of title, the apartment needed a lot of work before it could be rented for income. In April 2013, MESSINA was a full-time teacher and MAYER was a realtor collecting unemployment. MESSINA acknowledged that the apartment needed a new bathroom, and cosmetic work. From June through August, 2013, the parties remodeled the apartment. MESSINA stated that he worked on the apartment equally with MAYER. MESSINA explained that his parents and other family members assisted in the renovation, and donated materials and lent tools to the parties. In addition to the work that each party did, they used contractors in certain areas. MESSINA added that there were times when he came home that he found MAYER on the sofa, watching Netflix, or passed out from drinking.

MESSINA said that every day he asked MAYER for money toward the house expenses, and MAYER kept saying that he would get it. MESSINA denied that he had an agreement with MAYER whereby MAYER would put time in on renovating the house as his contribution for the cash payments made by MESSINA. MESSINA said that MAYER never demanded such an arrangement until October 31, 2013. From the "incident" that September to October 31, 2013, MAYER [*6] went in and out of the house. On redirect, MESSINA confirmed that he paid the income taxes on the rental income.

MESSINA's next witness was KATHLEEN MESSINA, plaintiff 's mother. Ms. Messina had known MAYER for about seven years and recognized the personal relationship that MESSINA and MAYER had which led them to an engagement and plans for marriage. She stated that at the time the parties discussed purchasing the subject property, MESSINA told her that he and MAYER agreed to split everything in half. At the time, MAYER worked with State Farm Insurance. Ms. Messina stated that from June through August 2013, she visited the subject premises 2 to 3 times a week to help clean the house. She acknowledged that MAYER would be working on the renovations, and stated that when MESSINA was not teaching he, too, would work on the premises. She added that there were about seven relatives that also contributed their time to help MESSINA and MAYER complete the renovations in the home. She described how MESSINA and

*3

MAYER both worked on re-designing the apartment bathroom, and as a result they had to add plumbing, tile and an additional wall. When the apartment was ready to rent, the rest of the house [*7] still needed work. Ms. Messina stated that she was not aware of any discussions between MESSINA and MAYER stating that anyone would be paid for their time in making the house repairs. Ms. Messina, herself, paid for an electrician, the sprinklers, and landscaping.

On cross-examination Ms. Messina reiterated that both parties told her, before purchasing the premises, that they were going to share the expenses on the house. She said that her brother-in-law helped tile the bathroom, and there were no complaints during the job. She explained that she also gave her son some money towards the house expenses, and paid some contractors directly. She acknowledged that any money that she gave MESSINA was a gift, and neither she nor her husband expected repayment. On the binder compiled by MESSINA she recognized the $124.00 she paid for a water boiler. According to Ms. Messina, during all the time she visited the premises that summer, she recalls meeting MAYER's mother only once. She stated that she noticed by September 2013, that the relationship between MESSINA and MAYER was becoming strained, but she never brought it up for discussion. Ms. Messina stated that during that summer, she did receive [*8] calls from her son that MAYER was always drunk. Although she personally did not see MAYER intoxicated she testified that when she visited she would see liquor bottles around the house. She stated that MESSINA never told her that he wanted MAYER to leave the property. She did recall that MESSINA spoke to MAYER about paying his share of expenses and MAYER said he was waiting for a paycheck to come in. She was aware that MESSINA was keeping a tabulation of the expenses MESSINA was paying.

MAYER's first witness was VICTORIA MAYER, defendant's mother. She described that MAYER was not employed at the time that the parties were talking about buying the house, but that he was a licensed realtor. She did not see the house until after it was purchased. The house needed work, but both MESSINA and MAYER told her they wanted this particular house because of the anticipated rental income generated by the accessory apartment. Ms. Mayer said she visited the house everyday. She frequently visited in the mornings before going to work. Ms. Mayer claimed that on

only one of her visits did she see the plaintiff's family at the premises. Ms. Mayer stated that she purchased materials for the house which included [*9] all the drywall, the bathroom floor and wall tile, two by fours, paint, and truck rentals. She claims to have spent almost $3,200.00 on her Home Depot credit card with a total of $6,200.00 contributed to the house repairs. She also stated that during her many visits, she recalls seeing MESSINA there only once. She confirmed Ms. Messina's impression that by the end of Summer 2013, the relationship between the MESSINA and MAYER was strained. She described how MESSINA was very stressed about the money situation. Ms. Mayer was then questioned about the September incident when she picked up her son from the subject premises. During the next 30 days, she would return to the house to get MAYER's clothing and computer. On October 31, 2013, they went back to the property to remove additional belongings when the final incident occurred.

On cross-examination, Ms. Mayer confirmed that her son was not employed at the time of the contract. She better explained that he was employed as a real estate broker, but was not earning any money. She explained that she visited the subject premises 3-to-4 days a week and would leave about 12:30 PM to get to work. Ms. Mayer added that she took about two weeks [*10] of days off from her job so that she could help at the subject premises. During that time MESSINA was there only one or two times. Ms. Mayer denied any talk about her son drinking at any time, and denied that MAYER had anything to drink at the time of the September incident.

KENT MAYER, the defendant, testified next. Since leaving the premises on September 30, 2013, he has been residing in East Northport with his family. MAYER stated that as a licensed real estate broker he and MESSINA saw about half dozen houses before selecting the subject premises. The draw of the subject premises was that it had an accessory apartment which would generate income. He acknowledged that although he was a real estate broker, he had no income. He claimed that the agreement he made with MESSINA was that while MAYER was not earning the income his contribution towards expenses would be

*4

the value of the work he contributed towards repairing the house. He described how one of the jobs was to shift the apartment bathroom back to the main house which required moving of walls. MAYER also believed that because he was not paid a real estate commission on the purchase of the premises, that he should receive a [*11] credit for that amount in the distribution of the value of the premises. MAYER stated that during the Summer of 2013, MESSINA was at the house only 1-to-2 times weekly because he worked on Fire Island. On September 30, 2013, he claimed he vacated the premises because he was violently assaulted by MESSINA. He left his belongings behind.

When asked on cross examination about MESSINA's family helping at the premises, MAYER stated that MESSINA's mother helped paint two rooms, the father sat at a computer, and an uncle did only about two hours of tile work that had to be redone. MAYER clarified that in March 2012 he lost his job at Allstate Insurance, and moved into the real estate business.

The last witness was a rebuttal witness by the plaintiff, DAWN PHELPS. Ms. Phelps was the tenant that took possession of the accessory apartment at the end of August, 2013. Ms. Phelps stated that she saw MAYER more during the day than she saw MESSINA, but that it seemed that the parties' relationship was normal. She then described how in September 2013, MAYER's demeanor changed. He did not come out of the house as much and she would hear arguing between the parties. She described that MAYER also did not [*12] appear as well as he did during the earlier part of that summer. MAYER wasn't dressed as if he had a job. In mid September 2013, the arguments between the parties escalated. She only heard the arguments through the wall, she never personally

observed one. Ms. Phelps described that frequently she heard yelling, screaming, and door slamming, through the walls of the apartment. MAYER, in her opinion, was the more aggressive voice. Then she described the incident on September 30, 2013. The noise and yelling was louder than usual. She stepped outside the apartment and saw MESSINA with his shirt ripped. She entered the house and saw what she described as a "disaster." MESSINA called MAYER's mother to come and pick MAYER up. On October 31, 2013, Ms. Phelps called MESSINA at work when a van arrived at the house to remove belongings. MESSINA arrived shortly thereafter.

On cross-examination, Ms. Phelps explained that she found the apartment on Craig's List. She walked through the September incident again. She added that she heard MESSINA say "get off me'" and "stop." She heard MAYER say "I hope you die."

EVIDENCE

Deed, dated April 2, 2013, to ANDREW MESSINA and KENT MAYER as joint tenants with [*13] rights of survivorship.

Note, dated April 2, 2013, by ANDREW MESSINA, for $270,000.00

HUD-1 Settlement Statement, dated April 2, 2013, reflecting contract sales price of $288,000.00, a realtor's commission of $5,600.00 paid by seller, and $19,579.44 in costs paid by purchasers.

MESSINA's bank statements (July 2013, through September 2013, reflecting monthly automatic withdrawals of $2,500.00 for the mortgage payment.

MESSINA's spreadsheet reflecting $21,037.98 in housing expenses (before any adjustments made at trial)

MESSINA's binder containing all the receipts for the items in the spreadsheet.

A copy of the monthly mortgage statement.

Accessory Apartment permit

*5

MESSINA's real estate appraisal, reflecting an appraised value of $280,000.00

MAYER's real estate appraisal, reflecting an appraised value of $303,000.00.

Additionally, the Court takes judicial notice of the Family Court Article 8 petitions filed by the parties as follows:

October 31, 2013 Petition Temp OP MESSINA v. MAYER Direct Mayer to stay away

March 10, 2014 Withdrawn

March 10, 2014 Petition Temp OP MAYER v. MESSINA Direct Messina to stay away

March 11, 2014 Petition Temp OP MESSINA v. MAYER Direct Mayer to stay away

June 9, 2014 [*14] Permanent OP Allowing MESSINA into premises, on consent

ANALYSIS

Although this was brought as a Partition Action, the Court does not believe that the parties intend for the premises to be sold at auction. Instead, the Court is charged with determining the balancing of the financial equities between the parties. Accordingly, the Court is presented with two issues:

1) What is the date on which MAYER's financial obligations for the premises terminate?

2) What is the financial equity between the parties for the care and maintenance of the premises?

Regarding the first question, MESSINA claims that MAYER voluntarily left the premises on September 30, 2013. MAYER contends that he was forced out by MESSINA. The Court needs to determine if MAYER is relieved from financial

responsibility for the premises from September 30, 2013, until March 10, 2014, as he contends. First, unlike the case referred to by MAYER, there is no evidence that MESSINA changed the locks on the doors, or took any other action to prevent MAYER from entering the premises. MAYER testified that for the month of October 2013, he freely entered the premises, albeit, in MESSINA's absence. It was not MESSINA who prevented MAYER from [*15] entering the premises, it was the Family Court through the temporary Order of Protection. Decisional law is replete with cases, especially in matrimonial actions, wherein the party "ousted" by an order of protection remains liable for rent or mortgage payments. To do otherwise would permit persons a doorway to escape financial responsibilities by engaging in conduct sufficient to warrant an order of protection against themselves. Lastly, there was no court finding of wrongdoing against either MESSINA or MAYER, nor an admission of wrongdoing by either, from which this Court can conclude that MEYER was wrongfully "ousted" as he claims. Accordingly, the period of accounting will be from the purchase of the premises until the date the action was commenced, April 1, 2014, uninterrupted by any periods during which temporary orders of protection existed.

Regarding the financial equities between the parties, New York Real Actions and Proceedings Law (RPAPL) §901 provides that:

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 [*16] for a sale if it appears that a partition cannot be made without great prejudice to

*6

the owners.

RPAPL §913 states:

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.

RPAPL §915 describes the drastic result of a partition in that:

[...] 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.

Accordingly, the only relief available in action for partition is the actual physical partition of the property, or, if that be inequitable, sale of the entire parcel and division of the proceeds. Vlcek v. Vlcek, 42 A.D.2d 308, 346 N.Y.S.2d 893 (3 Dep't 1973). However, absent showing of great prejudice or any inequity, sale of entire property [*17] was an improper alternative since this section permits such a sale only where property cannot be partitioned without great prejudice to owners. Prizzia v. Prizzia, 58 A.D.2d 722, 396 N.Y.S.2d 290 (3 Dep't 1977). Although partition is a statutory creation, it is nevertheless equitable in nature and the court can compel parties in a partition action to do equity as between themselves. Loveless v. Koening, 2013 NY Slip Op 861565(U); aff 'd, 124 A.D.3d 1348, 997 N.Y.S.2d 655 (4th Dep't 2015).

In performing the accounting, 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; however, mere fact that a tenant has made improvements or repairs upon the property does not in itself necessarily give a right to an equitable allowance since there must be proof of the circumstances and need for the restoration work.

Worthing v. Cossar, 93 A.D.2d 515, 462 N.Y.S.2d 920 (4 Dep't 1983). Even when the rights of the parties are not controverted in an action for partition, sale, and accounting, the trial court is still obligated to ensure that there is an accurate accounting of income and expenses of subject properties before entry of an interlocutory judgment directing their sale. Colley v. Romas, 50 A.D.3d 1338, 857 N.Y.S.2d 260 (3 Dep't 2008).

In considering various equities of the [*18] co-tenants in partition suit, the court should allow the reasonable value of improvements and repairs to the property, if they were made in good faith and were of substantial benefit to the premises. Vlcek v. Vlcek, supra, 346 N.Y.S.2d 893. Where a tenant in common in possession has made valuable improvements, he is entitled to compensation therefor, where the property is partitioned, as follows: First, the value of the land without the improvements should be ascertained; second, the value of the improvements; and third, the value of the use and occupation of the property, and after each tenant has received the value of his portion of the land exclusive of the improvements, and his part of its rental value during the period of occupancy, the balance, if any, should be paid to the tenant in possession, for his improvements. Eakin v. Knabe, 31 Misc. 221, 64 N.Y.S. 103 (1900). There is a presumption that mortgage payments and other payments for upkeep and maintenance of marital home made by a spouse prior to divorce are for benefit of the other spouse, but the presumption is rebutted by proof that one spouse abandoned the other and left that spouse with sole responsibility of maintaining the marital residence. Worthing v. Cossar, supra, 462 N.Y.S.2d 920. Generally, expenditures made by a tenant in excess of his obligations [*19] may be a charge against the interests of a cotenant in a partition action. Worthing v. Cossar, supra, 462 N.Y.S.2d 920. In a partition action between divorced parties, the wife was entitled to reimbursement for payments of principal on mortgage covering the property, made by wife, since decree of divorce became final, thus terminating tenancy by the entirety, including those payments made by wife after date of trial of partition suit, since such payments were for benefit of both parties, as tenants in common. Middleton v. Middleton, 123 N.Y.S.2d 231 (1953).

*7

The Court is not persuaded that MAYER is entitled to a credit for "sweat equity", that is, value for the work he put into the premises to make it livable and rentable. The major factor is that MAYER failed to produce any evidence, documentary or otherwise, as to the value of his work from which the Court could draw a conclusion. Under [our] system of adversary litigation, the task of furnishing evidence rest solely upon the parties, neither the judge nor the jury having any obligation or duty in this regard. Fisch on New York Evidence, Second Edition, §1087, Lond Publications 1977/2008. The only document introduced into evidence by MAYER was his real estate appraisal. The Court also finds that MAYER did not rebut the [*20] presumption that the payments made by MESSINA for mortgage and other payments for the upkeep and maintenance of the home was also for the benefit of MAYER especially because MAYER is seeking one half of the equity of the premises not on the date he alleges to have been "ousted," but on the date the action was commenced. Based upon the documents submitted into evidence, and the testimony of the parties, the Court concludes as follows:

Fair Market Value Mortgage balance 291,500.00 265,509.00 ADJUSTMENT TO MAYER

Equity (50 percent) 12,995.50

Mortgage payments 6/1/13-04/01/14 1,289.02 x 10, less 25 percent tax Adjustment (4,833.83)

Property Tax/Insurance 6/1/13-04/01/14 1,195.78 x 10, less 25 percent tax Adjustment (2,690.51)

Expenses for the repair of the premises, wood, fixtures, etc 2,707.28 (1,353.64)

Rent received $1,400.00 9/1-3/30/14; 7 months, less 25 percent tax adjustment 3,675.00

Equity due MAYER $7,792.53

The additional expenses for which MESSINA sought adjustments in his favor were for food, and other household expenses, which are not properly before the Court in a partition action. Absent a cause of action based on contract, or other viable claim, the court cannot make adjustments [*21] for the amounts he paid in the relationship and for which he expected to be reimbursed by MAYER.

Accordingly, it is

ORDERED and ADJUDGED that ANDREW MESSINA and KENT MAYER each have a one-half undivided interest in the subject premises; and it is further

ORDERED and ADJUDGED that an actual partition of the property cannot be made without great prejudice to the owners; and it is further

ORDERED and ADJUDGED that in light of the facts and circumstances it would not be equitable to sell the premises at auction if the equity due to KENT MAYER can be paid to him without undue delay; and it is further

*8

ORDERED and ADJUDGED that KENT MAYER is due the sum of $7,792.53, plus $116.88 as and for interest at the rate of 2 percent from April 1, 2014, until December 1, 2014; and it is further

ORDERED that the parties are directed to schedule a closing date no later than sixty (60) days from the date of this Order at which ANDREW MESSINA shall pay to KENT MAYER the sum of $7,909.41 in full satisfaction of the equity in the premises due and owing KENT MAYER, and KENT MAYER shall execute a BARGAIN & SALE DEED WITH COVENANTS in favor of ANDREW MESSINA for all right, title and interest KENT MAYER may have [*22] in the premises.

This constitutes the decision and order of the Court.

ENTER

New York Law Journal

Doyle v. Hamm

Supreme Court of New York, Appellate Division, Second Department

May 17, 1976

No Number in Original

Reporter
52 A.D.2d 899 *; 383 N.Y.S.2d 373 **; 1976 N.Y. App. Div. LEXIS 12745 ***

PAULA A. DOYLE, Formerly Known as PAULA A. HAMM, Appellant, v WILLIAM R. HAMM et al., Respondents.

Case Summary

Procedural Posture

Plaintiff ex-wife appealed from an order of the Supreme Court, Suffolk County (New York), which denied her motion to confirm the referee's report and for an interlocutory judgment of partition and sale, and denied her reimbursement from defendant ex-husband's share of the net proceeds of sale for certain expenditures made by her, and from so much of a further order of the same court, as upon reargument, adhered to the original determination.

Overview

The ex-wife brought a partition action against the ex-husband and appealed from an order of the supreme court, which denied her motion to confirm the referee's report and for an interlocutory judgment of partition and sale, and denied her reimbursement from the ex-husband's share of the net proceeds of sale for certain expenditures made by her, and from so much of a further order of the same court, as upon reargument, adhered to the original determination. The court granted the ex-wife's motion, holding that the determination of the referee, wherein he implicitly found that she should have been reimbursed from the ex-husband's net proceeds of the partition sale of the marital home, inter alia, for one-half of the payments made by her on the mortgage indebtedness, for maintenance and repair of the marital premises, and for taxes, etceteras, up to the time of the divorce, was eminently correct and should have been adopted by the supreme court. The court held that it was axiomatic in the ex-wife's action for partition, that that the supreme court could have adjusted the equities of the parties in determining the distribution of the proceeds of sale.

Outcome

The court reversed the supreme court's order and granted the ex-wife's motion to confirm the referee's report and for an interlocutory judgment of partition and sale in her action against the ex-husband for partition.

Opinion

[***1] [*899] [**374] In a partition action, the plaintiff wife appeals (1) from an order of the Supreme Court, Suffolk County, dated April 29, 1975, which (a) denied her motion (i) to confirm the Referee's report and (ii) for an interlocutory judgment of partition and sale and (b) directed the Referee to modify his findings of fact and conclusions of law so as to deny plaintiff reimbursement from the defendant husband's share of the net proceeds of sale for certain expenditures made by her and (2) as limited by her brief, from so much of a further order of the same court, entered September 17, 1975, as, upon reargument, adhered to the original determination. Appeal from the order dated April 29, 1975 dismissed as academic. That order was superseded by the order made upon

reargument. Order entered September 17, 1975 reversed insofar as appealed from, on the law and the facts, the motion to confirm the Referee's report and for an interlocutory judgment of partition granted; and action remanded to Special Term for further proceedings not inconsistent herewith. Plaintiff is awarded one bill of costs to cover both appeals. We believe that the determination of the Referee, wherein [***2] he implicitly found that the plaintiff wife should be reimbursed from the defendant husband's net proceeds of the partition sale of the marital home, *inter alia* for one-half of the payments made by her on the mortgage indebtedness, for maintenance and repair of the marital premises and for taxes, etc., up to the time of the divorce, was eminently correct and should have been adopted by Special Term. The record reveals that the parties married in September, 1954 and purchased the marital home as tenants by the entirety in November, 1962. They took title subject to an existing mortgage, which they evidently assumed and agreed to pay. [*900] Sometime in January, 1965 the husband began to drink excessively, to assault the wife and to leave the marital home for weeks at a time. He also failed to adequately support her and the children. In August, 1965 she obtained a Family Court order requiring him to pay $140 every two weeks as support for the family. His payments thereunder were sporadic. From August, 1966 until sometime in 1971 the husband was incarcerated for a conviction of the crime of manslaughter upon his plea of guilty. The parties were divorced in May, 1972. [***3] Finding that she and the five children by the marriage were in dire financial straits because of the willful failure of the husband [**375] to support them before he was incarcerated, and because of his inability to do so during his five-year confinement, the wife, in 1966, took a position in a hospital as a staff attendant for a salary of $120 per week, working the 4:00 P.M. to midnight shift. Between the commencement of her employment, and up to and after the divorce, she paid, from her earnings, the bills for repairs and maintenance of the home, and made all of the payments on the mortgage and for other incidentals, such as real estate taxes and insurance. She testified, without contradiction, that all of her earnings went for the preservation of herself and the five children so that the children would have a home. The record also indicates that after his release from prison in 1971, the husband's arrears for support totaled $21,350. In December, 1972, the arrears, on the husband's motion, were fixed at $1,700, and the weekly support payments for the children reduced from $140 to $20. However, even though he was accorded such relief, by making but a few of the $20 payments, [***4] he once again demonstrated that he had little or no disposition to support his family.In view of these facts, we conclude that Special Term erred in holding that the wife was not entitled to reimbursement from the husband's share of the proceeds of the partition sale for half of the substantial sums she expended from her earnings with respect to the marital home, from August, 1966 to the date of the divorce in May, 1972. As Special Term correctly stated, payments for the upkeep and maintenance of the marital home by one spouse, prior to a divorce, are normally presumed to have been intended as a gift to the other spouse. However, the evidence adduced herein completely destroyed that presumption. The record clearly demonstrates that the plaintiff shouldered burdensome and onerous responsibilities in connection with the subject premises in order to retain some semblance of a family life for herself and the five children, and also to protect her interest in the common property. For his part, both prior and subsequent to his incarceration, the husband evinced a crass indifference and total disregard, insofar as his interest in the premises carried with it a corresponding duty to pay [***5] for at least half of its carrying charges and maintenance costs in order that his family might continue to dwell under its roof. It is axiomatic that, in an action for partition, the court may adjust the equities of the parties in determining the distribution of the proceeds of sale *(Sirianni v Sirianni,* 14 AD2d 432). In the instant situation it would be grossly

inequitable to deny the wife's claim for reimbursement for the thousands of dollars expended by her simply because she occupied the subject premises with the five children. That the husband did not, or could not, share possession with her during the period in question was not because of any acts of hers which excluded him; it resulted from his own irresponsible behavior. Further, the abdication by him of his familial responsibilities during such period hardly justifies his obtaining any offset based on her exclusive occupancy (cf. *Embrey v Embrey,* 163 Md 162). Since all equities favor the wife, we have directed that she be reimbursed in accordance with the Referee's findings. Her motion to confirm the Referee's [*901] report and for an interlocutory judgment of partition and sale should have been granted [***6] in all respects. Cohalan, Acting P.J., Margett, Damiani, Rabin and Titone, JJ., concur [84 Misc 2d 683.]

Bonanno v. Flanagan

Supreme Court of New York, Suffolk County

November 14, 2014, Decided

7489/05

Reporter
2014 N.Y. Misc. LEXIS 4976 *; 2014 NY Slip Op 32937(U) **

[**1] MARIA PHILIPS BONANNO and CHRISTINE V. PHILIPS, Plaintiffs, -against- JOHN P. FLANAGAN, ERIN FLANAGAN LAZARD, VICTORIA E. PHILIPS, 395 PL REALTY and JAMES PHILIPS, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: [*1] For PLAINTIFFS: ESSEKS, HEFTER & ANGEL, LLP, Riverhead, New York.

For DEFENDANTS: CIARELLI & DEMPSEY, P.C., Riverhead, New York.

MICHAEL T. CORNACCHIA, ESQ., New York, New York.

Judges: HON. PAUL J. BAISLEY, JR., J.S.C.

Opinion by: PAUL J. BAISLEY, JR.

Opinion

Plaintiffs' action seeks remedies in the form of specific performance of a contract entered into by all parties to privately sell residential premises or, in the alternative, a judicial partition of those premises to be sold at public auction together with an award for money damages. The premises have been the primary residence of the defendant James Philips since 1984. The plaintiffs are the daughters of James Philips; the co-defendants are a third daughter of James Philips from a subsequent marriage with Helen Downey (Victoria E. Philips) and Helen Downey's two children from her prior marriage (John P. Flanagan & Erin Flanagan Lazard).

By deed dated January 29, 1962 defendant James Philips (J. Philips) purchased the 12.03 acre parcel in East Hampton, New York, which is the subject matter of this action. The premises have been improved with a residential dwelling and a swimming pool.

Defendant J. Philips conveyed title to the parcel to his then wife, Patricia [*2] Philips (P. Philips), in 1963. Plaintiffs Maria Philips Bonanno (M. Bonanno) and Christine V. Philips (C. Philips) are the daughters of J. Philips and P. Philips. P. Philips died in 1965. By Decree of the New York County Surrogate's Court dated May 1, 1965 title to the premises was divided into equal one-third shares to plaintiffs and their father, defendant J. Philips. Defendant J. Philips married Helen Downey (Downey) on December 10, 1970 and conveyed his one-third interest in the premises to Downey in September, 1971. Defendant Victoria Philips (V. Philips) was born in 1975 and is the daughter borne of the J. Philips/Downey marriage. Defendant J. Philips and Downey divorced in 1984. In August, 1972 Downey conveyed her interest in the premises to her own children from a prior marriage (defendants John P. Flanagan (J. Flanagan) & Erin Flanagan Lazard) and thereafter a series of conveyances resulted in Downey re-acquiring a one-ninth interest from January, 1981 until May, 1997. Defendant J. Philips re-acquired a one

percent interest from February, 2000 until August, 2002. The parties have stipulated that ownership of the parcel at the time of trial was vested [**2] as follows: a) one-third [*3] interest in plaintiff C. Philips; b) one-third interest in plaintiff M. Bonanno; c) one-ninth interest in defendant V. Philips; and d) two-ninths interest in defendant 395 PL Realty, Inc.

Plaintiffs claim that as a result of parental abuse they were forced to leave the premises and to reside elsewhere. Plaintiff C. Philips claims that she was thrown out of the residence when she was 15 or 16 years old and never returned. Plaintiff M. Philips claims she last resided in the premises at age 18 when she graduated from high school, but did spend additional summers there.

The premises were twice the subject of a tax sale to Suffolk County as a result of the owners' failure to pay real property taxes. The County obtained title by tax deed dated September 5, 2001. By County Resolution approved on November 25, 2002, Suffolk County permitted conveyance of the premises to plaintiffs (each obtaining a 1/3rd interest) and to defendants V. Philips, J. Flanagan and E. Flanagan (each obtaining a 1/9th interest) on condition of payment to the County in the sum of $104,085.72 representing full payment for back taxes, penalties and interest.

In order to comply with the County's Resolution, all parties entered [*4] into an agreement dated April 30, 2003 which set forth the method for financing payment to the County to redeem the premises together with provisions related to payment for other outstanding loans and indebtedness related to the property; the deposit of monies to be held in escrow for house maintenance and repayment of the loan obtained to finance the agreement; future summer rental of the premises; defendant J. Philips' rights to the use of the property; the listing of the property for sale; and the escrow agent's duties and responsibilities. Pursuant to the terms of the agreement financing was obtained by defendant V. Philips' execution of a promissory note and all parties execution of a mortgage in the sum of $300,000.00 in favor of Emigrant Savings Bank. Upon payment to the County (as set forth in the November 25, 2002 Resolution) of all sums due and owing to the municipality, title to the premises was conveyed to the parties by deed dated April 25, 2003 and recorded in the County Clerk's Office on May 30, 2003.

Home repairs and maintenance were performed on the premises and paid from the house maintenance account from July, 2003 through May, 2005. However, the premises were never [*5] rented for the summers during this period. Plaintiffs commenced this action by filing a complaint on March 22, 2005 claiming that the defendants breached the April 30, 2003 agreement by failing to list and show the premises for summer rental. Plaintiffs' complaint sets forth three causes of action seeking a partition pursuant to Article 9 of the Real Property Actions & Proceedings Law (first cause of action), seeking specific performance of the April 30, 2003 agreement (second cause of action), and seeking money damages based upon the defendants' breach of the agreement in failing to make a good faith effort to rent the premises for the summers of 2003 and 2004 (third cause of action).

Plaintiffs claim that they are entitled to end the co-ownership of the premises and are entitled as a matter of right to a partition to alienate their 2/3rd fee ownership interest. Plaintiffs assert that any form of physical partition, particularly the form advocated by the defendants, would cause great prejudice to the owners since: 1) there are four owners and the property cannot be divided into four lots to comply with the zoning ordinance: 2) any proposed subdivision would have to be approved by the town planning board which could result in the plaintiffs [*6] obtaining an illegal, non-buildable lot; 3) any subdivision approval would be costly and time-consuming with no guarantee of ultimate [**3] approval; and 4) judicial partition requires equalization of the value of each parcel in accordance with the individual's ownership interests. Plaintiffs also claim that the

preponderance of evidence shows that defendants breached the April 30, 2003 agreement by failing to rent the premises and therefore plaintiffs are entitled to sell the premises as required under the terms of the parties' agreement. Plaintiffs claim that they performed all duties required under the agreement and that defendants failure to rent the property justified commencement of this action two months before the May, 2005 contractual deadline. Plaintiffs assert that the parties agreement sets forth the terms for selling the premises including a formula for establishing the sales price (the average of three real-estate appraisals) and conducting the sale by listing with brokers rather than by public auction. Plaintiffs also assert that the proof together with the documentary evidence establishes that defendant J. Philips retains no life estate in the premises and therefore has [*7] no right to continue to reside there. Finally plaintiffs claim that the proceeds of the sale should be distributed to the parties according to their ownership interests with certain set-offs which include reimbursement for mortgage payments made by plaintiffs since the defendants 2005 breach and which would not include any credit to reimburse defendants for prior payment of real estate taxes since the parties previously agreed that defendant J. Philips was responsible for such payments while he resided in the premises and since the undisputed evidence showed that the plaintiffs were unjustifiably ousted from the premises in 1978 (plaintiff C. Philips) and in 1995 (plaintiff M. Philips).

Defendants claim that the April 30, 2003 agreement must be interpreted as an agreement not to partition the premises since it specifically provided that a sale could only proceed after May, 2005. Defendants also claim that the plaintiffs lacked standing to maintain a partition action since they failed to prove that they had actual or constructive possession of the premises. Defendants assert that the Court should declare that defendant J. Philips holds a life estate in the premises and that no partition [*8] action can therefore be successful. Defendants argue that plaintiffs are not entitled to specific performance of the agreement and that the defendants are entitled to damages based upon the plaintiffs' breach of the agreement. Defendants maintain that should the Court determine that a judicial partition is the proper legal remedy to resolve the issues in dispute that the preponderance of the evidence presented at trial favors a physical partition of the premises in accordance with the "Hemmer Map" subdividing the premises into two more than five acre lots. Defendants claim that the physical partition of the premises dividing the parcel into two lots could be done without prejudice to the parties and would afford defendant J. Philips the right to continue to reside in the dwelling where he has lived for the past 40+ years. It is the defendants' position that the accounting, which is a necessary incident of a partition, reveals that defendant J. Philips is entitled to be reimbursed for making tax payments since 1962 or, in the alternative, since 1983 when both plaintiffs had reached the age of 21. Defendants contend that there was no relevant proof submitted at trial to prove that either [*9] plaintiff was ousted from the premises or to show that defendant J. Philips and Helen Downey owned the premises as tenants-in-common when the alleged ouster occurred. Finally defendants claim that the plaintiffs breached the parties agreement by failing to list the premises for rent and by failing to cooperate with the defendants to maintain and improve the premises as required under the terms of the agreement.

A non-jury trial of the action was conducted on August 4, 2010; August 24, 2010; September 28, 2010; October 25, 2010 and November 10, 2010. Nine individuals testified at trial. They were: plaintiffs C. Philips and M. Philips, David Weaver (a licensed surveyor called on behalf of the plaintiffs), Teresa Quigley (escrow agent & attorney who represented defendant J. Philips with [**4] respect to the April 30, 2003 agreement), John Bonanno (plaintiff Maria Philips Bonanno's husband), John Berman (East Hampton real estate sales associate), Richard Whalen (private attorney specializing in land use and zoning), F. Michael Hemmer (a licensed surveyor called on behalf of the defendants) and Helen Downey. After

concluding the trial counsel for the parties submitted post-trial memorandums of [*10] law and decision was reserved.

The elements that must be alleged and proven at trial to sustain a viable breach of contract claim are: 1) formation of a contract between plaintiffs and defendants; 2) performance by the plaintiffs; 3) defendants' failure to perform; and 4) resulting damages proximately caused by the defendants' breach (*Renaissance Equity Holdings v. Al-An Elevator Maintenance*, 993 NYS2d 563, 2014 NY Slip Op. 06570 (2nd Dept., 2014)). The second and third causes of action set forth in the plaintiffs' complaint allege that defendants breached the April 30,2003 agreement as a result of the defendants' unjustified failure to list, show and rent the premises during the summers of 2003 and 2004 and they are therefore entitled to specific performance to sell the premises by private sale and/or money damages. The counterclaim set forth in the defendants' answer alleges a breach of the same contract by plaintiff Maria Bonanno, alleging that she unjustifiably failed to perform her obligations under the terms of the agreement with respect to payment for maintenance work and seeks money damages.

Neither the plaintiffs, nor the defendants, proved by a preponderance of the evidence at trial, that they are entitled to damages based upon breach of the April 30, 2003 agreement. The relevant, credible [*11] evidence at trial failed to establish that the defendants did not comply with their obligations under the terms of the agreement by failing to list, show and rent the premises for the summers of 2003 and 2004. Nor did the relevant, credible evidence at trial show by a preponderance of the proof that the plaintiff Maria Bonanno did not comply with her obligations under the terms of the agreement with respect to the house maintenance funds account. Accordingly neither party is entitled to money damages based upon the breach of contract claims and plaintiffs did not establish their right to specific performance of the contract which would require a private sale of the premises.

Real Property Actions & Proceedings Law 901 provides:

> 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.

While the statute confers on a tenant in common the right to maintain an action for partition, it is not accurate to say that partition is an absolute right, (*see 2 Tiffany, Law of Real Property [*12]* (3rd Edition), Section 474)). The remedy has always been subject to the equities between the parties (*see Graffeo v. Paciello*, 46 AD3d 613, 848 NYS2d 264 (2nd Dept., 2007) citing *Ripp v. Ripp*, 38 AD2d 65, 327 NYS2d 465 affirmed at 32 NY2d 755, 298 N.E.2d 114, 344 NYS2d 950 (1973)). A partition action is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the proceeds of sale (*Kiernan v. Martin*, 48 AD3d 641, 852 NYS2d 351 (2nd Dept., 2008)). Prior to partition and sale, equity requires that such issues as the interests of the parties and whether partition may be had without great prejudice must first be determined (*Grossman v. Baker*, 182 A.D.2d 1119, 583 NYS2d 92 (4th Dept., 1992); [**5] *Wolfe v. Wolfe*, 187 AD2d 628, 590 NYS2d 504 (2nd Dept., 1992); *George v. Bridbord*, 113 AD2d 869, 493 NYS2d 794 (2nd Dept., 1985); *Moses v. Moses*, 170 AD 211, 155 NYS 1066 (1st Dept., 1915)).

Real Property Actions & Proceedings Law 915 provides:

> 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.

Based upon a preponderance of the evidence presented during trial, plaintiffs have established their [*13] right to a partition of the premises pursuant to Article 9 of the Real Property Actions & Proceedings Law. The proof adduced at trial showed that by deed dated April 25, 2003 and recorded in the County Clerk's Office on May 30, 2003 plaintiffs each obtained a one-third ownership interest in the premises. Having shown their right to possession of the property by the conveyance embodied by the deed, the plaintiffs proved their entitlement to a partition of the property (*see Dalmacy v. Joseph*, 297 AD2d 329, 746 NYS2d 312 (2nd Dept., 2002)).

The two remaining issues to be determined pursuant to the statute are: 1) the rights, shares and interests of the parties in the property; and 2) a decision concerning whether the property is so circumstanced that actual, physical partition of the 12+ acre parcel would cause great prejudice to the owners. At trial, evidence was submitted in the form of a title certification declaring that ownership of the premises was divided among the parties with plaintiffs each owning a 1/3rd interest, defendant V. Philips owning a 1/9th interest and 395 PL Realty, Inc. owning a 2/9th interest. Counsel for all parties stipulated to the respective parties ownership interests so that there is no issue but that the parties must divide the proceeds of any sale of the premises consistent with [*14] their ownership interests.

With respect to the defendant J. Philips claim that he is entitled to a life estate or some form of a share of ownership interest in the premises under the terms of the April 30, 2003 agreement, there is no legal basis to make such a finding. It is clear from the credible testimony adduced at trial that attempts were made by the parties to accommodate the defendant by granting him permission to remain on the premises during the year, except for the summer rental season. However there is no reasonable interpretation of the parties agreement to find that there was ever any intent to convey to J. Philips a life estate.

With respect to the issue of the feasibility of a physical partition of the parcel, the preponderance of the proof at trial demonstrated that a physical partition could not occur absent great prejudice to the owners. The proof submitted showed that the parcel could only be subdivided into no more than two lots, which would necessarily have to be divided among the four owners. The value of both lots would thereafter need to be equalized so that each owner received a value [**6] commensurate with their respective ownership interests. Moreover, even were [*15] the Court to direct such a physical partition into the two lots proposed by the defendants' expert, final subdivision approval would remain subject to approval by the local town planning and zoning boards, with no guarantee that the subdivision would be approved. Given the time, expense and uncertainty of outcome surrounding this proposal, the evidence of great prejudice to the owners is clear and therefore the appointment of a referee to sell the premises as one lot at public auction is required pursuant to RPAPL 915.

Finally with respect to the issue of accounting, upon the sale of the premises by the referee, the proceeds shall be distributed to the parties in accordance with their ownership interests. The parties shall also share as a set-off (in accordance with their ownership interests) the amount required to pay off the mortgage encumbering the premises including interest and principal. The defendants application for a credit for back taxes paid is denied as the evidence at trial indicated that defendant J. Philips was responsible for payment of real estate taxes while he resided in the premises and based upon the 2003 agreement which provided the mechanism for disposing of any and all [*16]

pending liens affecting the property so that the residence could be redeemed. The plaintiffs application for reimbursement for mortgage interest accrued since May, 2005 is also denied since the plaintiffs failed to prove by a preponderance of the evidence that the defendants breached the 2003 agreement. Accordingly it is

ORDERED that plaintiffs are granted judgment against the defendants with respect to the first cause of action for judicial partition of the premises pursuant to Article 9 of the Real Property Actions and Proceedings Law; and it is further

ORDERED that the second and third causes of action set forth in the plaintiffs' complaint and the first counter-claim set forth in the defendants' answer are hereby dismissed; and it is further

ORDERED that plaintiffs' counsel shall submit to the Court within twenty days of entry of this order, a proposed interlocutory judgment pursuant to RPAPL 915, for the purpose of appointing a referee to sell the premises at public auction.

Dated: November 14, 2014

HON. PAUL J. BAISLEY, JR.

J.S.C.

Xing Ng v. Ng

Supreme Court of New York, Kings County

April 15, 2021, Decided

511137/2020

Reporter
2021 N.Y. Misc. LEXIS 1887 *; 2021 NY Slip Op 31289(U) **

[**1] XING NG AND TASHA NG, Plaintiffs, -against- SUE NG, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Reported at Ng v. Ng, 2021 NYLJ LEXIS 351 (Apr. 15, 2021)

Judges: [*1] HON. LILLIAN WAN, J.S.C.

Opinion by: LILLIAN WAN

Opinion

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 02) 65-94, 119-129 and (Motion 03) 97-116, were read on these motions seeking summary judgment and dismissal.

This action involves a dispute between co-owners of a two-story brownstone located in the County of Kings, City and State of New York. The premises has four levels, to wit: a basement, first, second and third floors. According to the deed, the property was purchased in 2008, and the plaintiffs received a one-third undivided interest and the defendant received a two-thirds undivided interest. Immediately upon purchase the parties constructed a physical partition of the premises consisting of a locked partition door separating the third floor, where the plaintiffs reside, from the first and second floors, where the defendant resides with her son. Each party retained a key to the door to allow the plaintiffs access to the commons areas, including the backyard, backroom, a storage closet and the basement. The parties do not dispute their respective ownership interest in the property.

The plaintiff is seeking, inter alia, summary judgment on the plaintiffs' [*2] first cause of action for partition, declaring the rights, shares and interests of the parties in the premises as set forth in the deed; directing that a Referee be appointed and the premises be sold at public auction, and that the plaintiffs or any of the parties to this action may purchase the premises at the sale; directing that after paying the mortgage holder and all other amounts necessary to clear title the funds be placed into an escrow account until final judgment is entered in this action; and directing each party, on demand of the purchaser, to deliver to the purchaser all title, deeds and/or writings under the control of that party, and all other title deeds or writings to be deposited with the Kings County Clerk.

[**2] The plaintiff also seeks dismissal of the defendant's first counterclaim which seeks a declaratory judgment giving the defendant sole and exclusive use and enjoyment of the first and second floors, basement, backyard, backroom and storage area, and that the plaintiffs have no legal right to partition.

The defendant opposes the plaintiffs' motion, and

cross moves seeking summary judgment, pursuant to CPLR 3212(b), on her second and third counterclaims for damages based on the [*3] plaintiffs' failure to pay expenses and their portion of the mortgage; and summary judgment on the defendant's fourth counterclaim seeking an accounting of the amount of the plaintiffs' outstanding share of the cost and expense of the upkeep of the property, utilities, mortgages, liens or encumbrances, and any other expenses necessary to maintain the property.

The defendant argues that a partition for sale is not required, and contends that the premises are already physically partitioned, and that it would cost approximately $36,000 to completely partition the property to provide the plaintiffs with access to the basement, backyard, backroom, and staircase storage from the plaintiffs' third floor space. She claims that officially partitioning the premises into separate apartments would neither harm nor prejudice either party. The defendant submits as an exhibit an estimate of the cost of a physical partition from a construction company that is neither certified nor sworn. Defendant contends that the equities do not favor partition, and that the plaintiffs have not established that a physical partition of the premises cannot be obtained without great prejudice to the owners. The defendant [*4] argues that the parties have a binding agreement for partitioned use and occupancy of the premises based on the separation of the parties' living areas by a locked door between the defendant's residence on the first and second floors, from the third floor, where the plaintiffs reside, which was done shortly after the premises was purchased. According to the defendant, this oral agreement was partly performed, and therefore the Statute of Frauds requiring a written agreement is not applicable. The defendant also seeks dismissal of the plaintiffs' second, third, fifth, seventh and eighth causes of action, pursuant to CPLR 3212(b), as a matter of law.

Apparently, there have been disputes between the parties over the years concerning use of the common areas, including the basement, shed, front yard, backyard, backroom and a storage closet. In her affidavit, the defendant contends that she had sole use and occupancy of those common areas, and that she permitted the plaintiffs to access the common areas on the first and second floors. The split of the expenses for upkeep and maintenance of the premises as well as the mortgage was agreed upon, and each party complied with the arrangement for the first [*5] 10 years.

[**3] The relationship between the parties deteriorated over the years and culminated in the defendant changing the lock to the door separating the living areas of the parties in December of 2019. The plaintiffs claim that the defendant refused to provide the plaintiffs with a key to the door, and were excluded from the use and enjoyment of the common areas of the property. The defendant asserts that the plaintiffs have stopped paying the agreed upon expenses and mortgage.

The property was placed on the market for sale, and in December of 2019 an offer of $1.5 million dollars was rejected by the parties. Thereafter, the defendant refused to allow a showing of her part of the house until the plaintiffs brought all payments up-to-date. The parties ceased all attempts to sell the property in January of 2020, and this action followed.

It is well-settled that one who holds an interest in real property as a tenant in common may maintain an action for the partition of the property and for a sale, if it appears that a partition alone would greatly prejudice the owners of the premises. *See* Real Property Actions and Proceedings Law (hereinafter RPAPL) § 901(1); *see also Tsoukas v Tsoukas*, 107 AD3d 879, 968 N.Y.S.2d 109 (2d Dept 2013); *Donlon v Diamico*, 33 AD3d 841, 823 N.Y.S.2d 483 (2d Dept 2006). However, before a partition [*6] or sale may be directed, a determination must be made as to the rights, shares or interests of the parties and where a sale is demanded, whether the property or any part thereof is so circumstanced that a partition cannot be made

without great prejudice to the owners. *See* RPAPL § 915. Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises. *See* RPAPL § 911; §915; *Hales v Ross*, 89 AD3d 1261, 932 N.Y.S.2d 263 (2d Dept 2011); *see also Lauriello v Gallotta*, 70 AD3d 1009, 895 N.Y.S.2d 495 (2d Dept 2010).

Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report. *See* RPAPL § 911; § 907; *see also Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869, 493 N.Y.S.2d 794 (2d Dept 1985). Moreover, because of the equitable nature of a partition action, an accounting by and between the parties is necessary, and should be done as a matter of right before entry of an interlocutory or final judgment, and before any division of funds between the parties is adjudicated. *See Donlon v Diamico*, 33 AD3d 841, 823 N.Y.S.2d 483. The Court has the authority to adjudicate the rights of the parties "so each receives his or her proper share of the property and its benefits." *See Brady v Varrone*, 65 AD3d 600, 602, 884 N.Y.S.2d 175 (2d Dept 2009).

Here, the plaintiffs have demonstrated their entitlement to maintain this action for partition by providing [*7] a certified copy of the deed indicating that the plaintiffs hold an undivided one-third interest in the property, and that the defendant holds an undivided two-thirds interest in the property as tenants in common, which is not disputed by the defendant. The defendant has [**4] failed to raise a triable issue of fact that a physical partition of the property can be accomplished without great prejudice to the owners. The unsworn and uncertified construction invoice submitted by the defendant which ostensibly provides an estimate of the cost of physically partitioning the premises to permit the plaintiffs access to the common areas, is insufficient to support a showing that partitioning is possible or even plausible. In light of the foregoing, the plaintiffs' motion seeking partition and sale of the property is granted.

The plaintiffs have also established their entitlement to dismissal of the defendant's first counterclaim seeking a declaratory judgment permitting her exclusive use and enjoyment of the first and second floor of the premises, including the backyard, basement, first floor backroom and storage area; that the plaintiffs have no legal entitlement to partition and sale of the property; [*8] and that the plaintiffs are not entitled to an accounting from the defendant. A tenancy in common represents a form of ownership which provides for the "right of each cotenant to use and enjoy the entire property as would a sole owner. This undivided interest is a right enjoyed by all the cotenants whether or not they are in actual possession of the premises." *See Butler v Rafferty*, 100 NY2d 265, 269, 792 N.E.2d 1055, 762 N.Y.S.2d 567 (2003). Therefore, the plaintiffs and the defendant each have the right to use and enjoy all parts of the premises, and contrary to the defendant's assertions, she is not entitled to exclusive use and occupancy of specific sections of the property. Moreover, the defendant has failed to demonstrate that there was a binding agreement between the parties concerning her right to exclusive use and occupancy of those particular areas of the premises. The alleged oral agreement falls within the purview of the Statute of Frauds, which holds that "[a]n oral agreement to convey an estate or interest in real property...is nugatory and unenforceable," and "[a] party to the agreement may legally and rightfully refuse to recognize or perform it." *See Pattelli v. Bell*, 187 Misc.2d 275, 278, 721 N.Y.S.2d 734, 2001 NY Slip Op 21098 (Sup Ct, Richmond County 2001), quoting *Woolley v Stewart*, 222 NY 347, 350-351, 118 N.E. 847 (1918) (internal quotation marks omitted).

As to the defendant's cross-motion, she has not [*9] tendered admissible evidence establishing her entitlement to summary judgment on her second and third counterclaims which seek damages based on the plaintiffs' alleged failure to

pay for the expenses, utilities, mortgage, insurance and taxes on the property. As such, that prong of the defendant's cross motion is denied. However, the defendant's motion seeking an accounting is granted, as it is a necessary requisite to a partition of sale. *See Donlon v Diamico*, 33 AD3d 841, 823 N.Y.S.2d 483.

Finally, the defendant's request for dismissal of the plaintiffs' second, third, fifth, seventh and eighth causes of action based on CPLR § 3212(b) is denied. Section 3212(b) provides, in pertinent part, that "[e]xcept as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." The plaintiffs' [**5] second, third, fifth, seventh and eighth causes of action involve allegations that the defendant prevented the plaintiffs from use and occupancy of the entire premises; that the defendant ejected the plaintiffs in a "forcible and unlawful manner"; that the defendant destroyed and demolished areas of the premises; that the defendant has improperly exercised exclusive use and occupancy of the common areas [*10] of the premises; and that the defendant deliberately inflicted harm upon the plaintiffs. In the case at bar, the defendant has failed to submit admissible evidence, other than her own conclusory affidavit, demonstrating her entitlement to summary judgment as a matter of law that no genuine issue of fact exists concerning these causes of action. *See Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the plaintiffs' motion for summary judgment (Motion 02) on their first cause of action seeking partition and sale of the property is granted; and it is further

ORDERED AND ADJUDGED, that the plaintiffs have demonstrated that the property cannot be physically partitioned without great prejudice to the owners; and it is further

ORDERED AND ADJUDGED, that the plaintiffs own an undivided one-third interest in the subject premises and the defendant owns an undivided two-thirds interest in the subject premises as tenants in common; and it is further

ORDERED AND ADJUDGED, that a Special Referee is hereby appointed to hear and determine an accounting as to expenses incurred by the parties, including real property taxes, utility bills and mortgage payments, [*11] liens and/or encumbrances, and the parties' relative share of the cost and expenses necessary for the maintenance and operation of the property; and it is further

ORDERED AND ADJUDGED, that an Interlocutory Judgment of Partition and Sale will be issued subsequent to the submission of the Special Referee's hearing and determination concerning the accounting; and it is further

ORDERED AND ADJUDGED, that the prong of the plaintiffs' motion seeking dismissal of the defendant's first counterclaim is granted; and it is further

[**6] ORDERED AND ADJUDGED, that the defendant's cross motion (Motion 03) seeking summary judgment on her second and third counterclaims is denied; and it is further

ORDERED AND ADJUDGED, that the prong of the defendant's motion seeking summary judgment on her fourth counterclaim and seeking an accounting of each parties' share of the costs and expenses, mortgages, liens, encumbrances or any other expenses associated with the maintenance and upkeep of the property is granted to the extent that an accounting shall be conducted by the Special Referee hereby appointed; and it is further

ORDERED AND ADJUDGED, that the prong of the defendant's motion seeking dismissal of the plaintiffs' [*12] second, third, fifth, seventh and eighth causes of action is denied.

This constitutes the decision and order of

the Court. Dated: April 15, 2021

/s/ Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.

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