

Pachter v RNR Realty Group LLC

2020 NY Slip Op 33332(U)

October 7, 2020

Supreme Court, Kings County

Docket Number: 518318/2019

Judge: Pamela L. Fisher

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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 7th day of October 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
RENA PACHTER and CARMi LINDENBERG,

Plaintiffs,

DECISION/ORDER

- against -

Index No: 518318/2019

RNR REALTY GROUP LLC,

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1-2, 3-4, 5-6</u>
Opposing Affidavits (Affirmations) _____	<u>4, 7-9, 10</u>
Reply Affidavits (Affirmations) _____	<u>7, 11</u>

Upon the foregoing papers, defendant RNR Realty Group LLC moves in motion sequence 4 (cross motion to motion sequence 3), for an order, pursuant to CPLR § 3211(a)(1), to dismiss the amended complaint with prejudice. Defendant also moves for an order pursuant to CPLR §§ 6514(a) and 6514(c), cancelling the notice of pendency, and for costs of this cross-motion, including attorney’s fees in the amount of at least \$4000. Defendant seeks an order imposing monetary sanctions upon plaintiffs and their counsel, pursuant to 22 NYCRR § 130-1.1, for filing the suppression motion (motion sequence 3).

Defendant RNR Realty Group LLC moves in motion sequence 5, for an order pursuant to CPLR §§5015 and 2005, to vacate the order dated March 5, 2020 that was granted on default suppressing the decedent, Judith Lindenberg’s tax returns (motion sequence 3).

Background

Plaintiffs commenced this action to partition real property located at 811-815 Ocean Avenue, Brooklyn, NY (Block 5163, Lot 57) on August 19, 2019 (Summons & Complaint, NYSCEF #1).

Plaintiffs contend that Ms. Judith Lindenberg, who passed away on May 8, 2018, owned one-half of the property (Amended Complaint ¶ 19, annexed as exhibit A to plaintiffs' motion papers, motion sequence 3). The plaintiffs are Ms. Lindenberg's brother and sister, and defendant is an owner of the property (*Id.* at ¶ 14, 26). The original complaint indicates that plaintiffs inherited decedent's interest in the property pursuant to her last will and testament (Complaint ¶ 12). On November 13, 2019, the Queens County Surrogate's Court revoked Judith Lindenberg's will (Queens County Surrogate's Court Order dated November 13, 2019, Exhibit B to defendant's motion papers, motion sequence 4). On January 22, 2020, the Court granted plaintiffs' motion for leave to amend their complaint pursuant to CPLR § 3025(b) to delete any reference to a will, indicating that the laws of intestate succession govern whether the plaintiffs have any interest in the property (NYSCEF #41). The amended complaint states that upon her death, Ms. Lindenberg's interest in the property "automatically and immediately vested upon [plaintiffs]" "[b]y operation of law" (Amended Complaint ¶ 17; *see also* EPTL § 4-1.1(a)(5)). The amended complaint contains three causes of action: (1) for a declaratory judgment that the plaintiffs are "jointly 1/2 owners of the property as tenants-in-common," (2) for partition and sale of the property, and (3) for an equitable accounting (Amended Complaint at 4-5).

On January 27, 2020, plaintiffs moved in motion sequence 3, for an order, pursuant to CPLR § 3103(c), suppressing and excluding decedent's tax returns (NYSCEF #'s 37, 38). Defendant filed a cross-motion to plaintiffs' suppression motion on February 11, 2020 (NYSCEF #43). Both motion sequences 3 and 4 were scheduled to be heard by the court on March 4, 2020 (Exhibit P to defendant's motion papers, motion sequence 5). The parties stipulated to adjourn defendant's cross motion to dismiss plaintiffs' amended complaint (motion sequence 4) to March 18, 2020 (Stipulation to Adjourn Motion Sequence 4, NYSCEF #67, annexed as Exhibit C to defendant's motion papers, motion

sequence 5). On March 4, 2020, defendant's counsel did not appear in court to oppose plaintiffs' suppression motion (motion sequence 3), and the motion was marked submitted (Exhibit P to defendant's motion papers, motion sequence 5). In an order dated March 5, 2020, the Court granted plaintiffs' suppression motion on default (Exhibit A to defendant's motion papers, motion sequence 5).

Discovery in Prior Surrogate's Court Proceeding

In a prior discovery proceeding in Surrogate's Court, entitled, *In the Matter of the Estate of Judith Lindenberg*, plaintiffs' counsel served a document production request upon Robert Lubin, CPA, decedent's accountant, Aryeh Weber d/b/a The Law Offices of Aryeh Weber, and Myron Winiarsky, Esq. (First Request for Production of Documents dated December 3, 2018 at 1, annexed as Exhibit G to defendant's motion papers, motion sequence 4). One of the items requested was "[a]ll tax returns, tax filings, or tax documents filed for or with respect to Ms. Lindenberg" (*Id.* at ¶ 16). On January 30, 2019, plaintiffs' counsel served subpoenas duces tecum upon Mr. Lubin and Mr. Winiarsky requiring them to personally appear for depositions at plaintiffs' law firm on February 25, 2018 and February 27, 2018, respectively; they were also required to produce certain documents, including Ms. Lindenberg's tax returns (Subpoena Duces Tecum and Ad Testificandum upon Robert Lubin, CPA at 1, 2 ¶ 16, annexed as Exhibit G to defendant's motion papers, motion sequence 4; Subpoena Duces Tecum Ad Testificandum upon Myron Winiarsky at 1, 2 ¶ 16 annexed as Exhibit G to defendant's motion papers, motion sequence 4). On February 26, 2019, Nativ Winiarsky, Esq., Mr. Lubin's attorney emailed the requested documents, including Ms. Lindenberg's tax returns to Zachary Kuperman, Esq., plaintiffs' counsel (February 26, 2019 email, annexed as Exhibit H to defendant's motion papers, motion sequence 4). Marcus Colagiacomo, Esq., who allegedly represented David & Esther Winiarski in the Surrogate's Court action, was also copied on the February 26, 2019 email (*Id.*; Defendant's Affirmation in Support of Cross Motion ¶ 11). Nativ Winiarsky also forwarded the documents to Myron Winiarsky, Esq., the attorney who represented RNR Realty Group LLC prior to July 22, 2020 (*Id.* at ¶

12; Exhibit I to defendant's motion papers, motion sequence 4; Substitution of Attorney, NYSCEF #93).

Parties' Contentions

Motion Sequence 4

In support of its motion to dismiss plaintiffs' amended complaint, defendant maintains that the documentary evidence that it has submitted in support of this motion conclusively establishes that decedent had no interest in the property at the time of her death (Defendant's Affirmation in Support of Cross-Motion ¶ 38). In support of its motion, defendant has provided decedent's 2017 federal and state income tax returns, a deed from December 30, 1995, conveying the property from David Winiarski, the sole member of the LLC to RNR Realty Corp, the operating agreement of RNR Realty Group LLC, and federal income tax returns for David & Esther Winiarski for 2017 and 2018 (Exhibits C, D, E, F, annexed to defendant's motion papers, motion sequence 4). Defendant alleges that the decedent's failure to report the rental income from the property on Schedule E of her federal tax return precludes plaintiffs from claiming an ownership interest in the building (Defendant's Affirmation in Support of Cross Motion ¶ 51). Defendant contends that David Winiarski's tax returns indicate that the LLC owns the entire building, and that the deed and the operating agreement also support defendant's contention that it owns the property (*Id.* at ¶¶ 52, 53). Defendant argues that plaintiffs' motion to suppress Judith Lindenberg's tax returns is sanctionable, as defendant claims that it did not acquire the tax returns illegally (*Id.* at ¶¶ 59, 60).

In opposition to defendant's motion to dismiss, plaintiffs maintain that defendant has not satisfied its burden on the motion to dismiss, since the documentary evidence submitted does not "utterly refute" plaintiffs' claim of ownership (Plaintiffs' Affirmation in Opposition to Defendant's Cross Motion to Dismiss the Amended Complaint ¶ 9). Plaintiffs dispute defendant's contention that the 1995 deed establishes defendant's complete ownership of the property, since the property was

conveyed to RNR Realty Corp., not to RNR Realty Group LLC (*Id.* at ¶¶ 14-15). Further, plaintiffs suggest that deeds are never conclusive evidence of title, since they do not take into account future transactions, adverse possession, prescriptive easements, etc. (*Id.* at ¶¶ 16-17). Plaintiffs argue that Ms. Lindenberg's tax returns do not indicate whether decedent had an ownership interest in the property, since a taxpayer reports rental income on Schedule E, not property ownership (*Id.* at ¶¶ 21-22). As an example, plaintiffs point out that David and Esther Winiarski do not claim ownership of the property but reported rental income from the property on Schedule E of their 2017 and 2018 tax returns (*Id.* at ¶ 23). Moreover, plaintiffs contend that decedent's tax returns should not be considered on this motion, since "they were not properly obtained" (*Id.* ¶ at 31). Since the relief plaintiffs seek directly affects title to the property, plaintiffs indicate that the notice of pendency should not be cancelled, and costs should not be awarded to the defendant, since the action was not brought in bad faith (*Id.* at ¶ 32).

In reply, defendant maintains that its motion to dismiss should be granted even if the court chooses not to consider decedent's tax returns (Defendant's Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶ 31). Defendant reiterates that it has submitted documentary evidence that establishes that decedent had no ownership interest with respect to the property at the time of her death, and that the plaintiffs have failed to submit any evidence documenting decedent's ownership interest (*Id.*).

Motion Sequence 5

In support of its motion to vacate the order issued by the court granting plaintiffs' motion to suppress decedent's tax returns, defendant contends that it defaulted due to a law office failure, and it has a meritorious defense to the suppression motion (Defendant's Affirmation in Support of Motion to Vacate Default ¶ 3). Defendant's counsel explains that since he and plaintiffs' counsel stipulated to adjourn the cross motion (motion sequence 4) to a later date, he also believed that plaintiffs' motion for

suppression (motion sequence 3) would be adjourned as well and heard on the same date as defendant's cross motion (*Id.* at ¶ 4). Defendant contends that the default should be vacated since it has a meritorious defense to the suppression motion, as defendant's counsel lawfully obtained the tax returns in an action in Surrogate's Court (*Id.* at ¶ 50).

In opposition, plaintiffs argue that misinterpretation of the terms of stipulation is not a reasonable excuse for a default (Plaintiff's Affirmation in Opposition to Defendant's Motion to Vacate Default ¶¶ 6, 26). Further, plaintiffs allege that defendant has not provided a meritorious defense to their suppression motion, as disclosure of tax returns is disfavored, defendant was not a party to the prior Surrogate's Court action, and defendant has failed to explain how the tax returns came into its possession (*Id.* at ¶¶ 38, 40, 59, 69).

In reply, defendant reiterates that it had a reasonable excuse for the default, and RNR Realty Group LLC did not improperly obtain Ms. Lindenberg's tax returns (Defendant's Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶¶ 5, 27, 30). Defendant states that although the LLC was not a party to the discovery proceeding, David Winiarski, its sole member, was a party to the discovery proceeding, and all parties in that proceeding were entitled to receive the tax documents (*Id.* at ¶¶ 27, 30).

Law

Motion to Vacate Default

A court has discretion in deciding whether to vacate an order entered upon a party's default (CPLR § 5015(a)(1); CPLR § 2005; *White v. Incorporated Vil. Of Hempstead*, 41 AD3d 709, 710 [2d. Dept. 2007]). A party who moves to vacate a default has the burden of demonstrating a "reasonable excuse for the default" and a "potentially meritorious defense" (*Advanced Remodeling of Long Is., Inc. v. Monahan*, 175 AD3d 1361, 1362 [2d. Dept. 2019]). Courts consider whether the defaulting party has provided sufficient details of the reason it failed to appear, whether the defaulting party "promptly

moved to vacate the order entered upon default,” whether the failure to appear was willful, and whether the failure to appear was a one-time occurrence, or the party has failed to appear numerous times (*Hageman v. Home Depot USA, Inc.*, 25 AD3d 760, 761 [2d. Dept. 2006]; *Advanced Remodeling*, 175 AD3d at 1362; *Castellotti v. Castellotti*, 165 AD3d 926, 928 [2d. Dept. 2018]).

Discovery

Parties do not have a right to “circumvent the discovery process” (*Alpha Funding Group, Inc. v. Continental Funding, LLC*, 17 Misc.3d 959, 967 [Sup Ct, Kings County 2007]). Discovery of income tax returns is disfavored in New York and requires a “strong showing that the information is indispensable to the claim and cannot be obtained from other sources” (*Latture v. Smith*, 304 AD2d 534, 536 [2d. Dept. 2003]; *Briton v. Knott Hotels Corp.*, 111 AD2d 62, 62-63 [1st. Dept. 1985]). Pursuant to CPLR § 3103(c), “[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed” (CPLR § 3103(c)). Pursuant to CPLR § 3120(3), a party who serves a subpoena duces tecum upon another party to produce documents, must also “serve a copy of the subpoena upon all other parties, and within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof” (CPLR § 3120(3)). CPLR § 3105 indicates that parties “in default for failure to appear” are not “entitled to notice or service of any copy required under [Article 31 of the CPLR] (CPLR § 3105). Pursuant to CPLR § 2103(e), “[e]ach paper served on any party shall be served on every other party who has appeared” (CPLR § 2103(e)). A discovery proceeding in Surrogate’s Court “cannot be used for the purpose of ascertaining and discovering evidence to be used in another action or proceeding” (*In re Cohen’s Estate*, 1 Misc.2d 626, 627 [Surrogate’s Court, Bronx County 1956]; *In re Brown’s Estate*, 141 Misc. 805, 807 [Surrogate’s Court, Kings County 1931]).

Sanctions

Pursuant to 22 NYCRR § 130-1.1, a court has the power to sanction a party or an attorney for “frivolous conduct” by requiring the attorney or party to reimburse the other party for costs it incurred and “reasonable attorney’s fees” (22 NYCRR § 130-1.1(a)). “[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false” (22 NYCRR § 130-1.1(c)). “In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (22 NYCRR § 130-1.1(3)).

Motion to Dismiss

Pursuant to CPLR § 3211(a), on a motion to dismiss, the court “must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Qureshi v. Vital Transp. Inc.*, 173 AD3d 1076, 1077 [2d. Dept. 2019]). Pursuant to CPLR § 3211(a)(1), a motion to dismiss based on documentary evidence may be granted only if “the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Id.*). Evidence is documentary if it is “unambiguous and of undisputed authenticity” (*Id.*).

Notice of Pendency

Pursuant to CPLR § 6514(a), a court, upon motion, must cancel a notice of pendency “if the action has been settled, discontinued, or abated” (CPLR § 6514(a)). The court has the discretion to award “costs and expenses occasioned by the filing and cancellation, in addition to any costs of the

action” (CPLR § 6514(c)). CPLR § 6501 states that “[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property” (CPLR § 6501).

Analysis

Motion to Vacate Default

Defendant’s motion to vacate the default order entered on March 5, 2020, is granted. Defendant has offered a “reasonable excuse” for its default since both attorneys had signed a stipulation to adjourn defendant’s cross motion, and it would have made sense for both motions to have been heard on the same date (Defendant’s Affirmation in Support of Motion to Vacate Default ¶¶ 3-4). Defendant has only failed to appear once, the failure to appear was not willful, and defendant promptly moved to vacate the default (Defendant’s Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶¶ 12-13). The court also prefers to decide cases on the merits (*See Hyde Park Motor Co., Inc. v. Sucato*, 24 AD3d 724, 724 [2d. Dept. 2005]). Defendant has also established a “potentially meritorious defense” to plaintiffs’ suppression motion, in that defendant claims that it did not do anything improper or unethical to obtain decedent’s tax returns (*Advanced Remodeling*, 175 AD3d at 1362; Defendant’s Affirmation in Support of Cross-Motion ¶ 65). Therefore, the court must now decide plaintiffs’ motion to suppress decedent’s tax returns pursuant to CPLR § 3103(c) on the merits.

Motion to Suppress Judith Lindenberg’s Tax Returns

In support of their motion to suppress, plaintiffs argue that federal law prohibits the “unauthorized disclosure of a taxpayer’s tax returns” (Plaintiffs’ Affirmation in Support ¶ 6, motion sequence 3). Plaintiffs maintain that “a party seeking to compel production” of tax returns must “make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources” (*Id.* at ¶ 7, *Weingarten v. Braun*, 158 AD3d 519, 519-20 [1st Dept.

2018]; *Pinnacle Sports Media & Entm't, LLC v. Greene*, 154 AD3d 601, 601 [1st Dept. 2017]).

Plaintiffs claim that defendant did not make this showing, “bypass[ing] the appropriate discovery process,” and “illicitly obtain[ing] this material” (*Id.* at ¶¶ 8-9).

Defendant, in its cross motion, disputes that it improperly obtained decedent’s tax returns (Defendant’s Affirmation in Support of Cross Motion ¶ 8). Defendant alleges that plaintiffs subpoenaed and served document demands to obtain decedent’s tax returns, Mr. Lubin’s attorney complied with the document production demands, and these documents were properly emailed to defendant’s former attorney, Myron Winiarsky, Esq., as a party to the discovery proceeding (*Id.* at ¶¶ 9, 10, 12).

In reply, plaintiffs contend that the CPLR does not allow a producing party to email documents to every party in a discovery proceeding (Plaintiffs’ Affirmation in Reply in Support of Plaintiffs’ Motion to Suppress and in Opposition to Defendant’s Cross Motion for Sanctions ¶ 14). Further, even if all parties in the discovery proceeding were entitled to obtain the documents, plaintiffs point out that RNR Realty Group LLC was not a party to the discovery proceeding (*Id.*). Plaintiffs also argue that Myron Winiarsky, Esq., submitted an affirmation in Surrogate’s Court claiming that he was not a party to the discovery proceeding, and he cannot take an inconsistent position in this action (*Id.* at ¶¶ 26-27).

The court declines to consider decedent’s tax returns on defendant’s motion to dismiss, because parties may not “circumvent the discovery process” (*Alpha Funding Group, Inc.*, 17 Misc.3d at 967). Although defendant’s former attorney and defendant’s sole member obtained the documents in a prior Surrogate’s Court discovery proceeding, defendant has not made a showing in this action that the “information is indispensable to the claim and cannot be obtained from other sources” (*Latture*, 304 AD2d at 536; *Briton*, 111 AD2d at 62-63; *Weingarten*, 158 AD3d at 519-520). Also, discovery proceedings in Surrogate’s Court “cannot be used for the purpose of ascertaining and discovering evidence to be used in another action or proceeding” (*In re Cohen’s Estate*, 1 Misc.2d at 627; *In re*

Brown's Estate, 141 Misc. at 807). There are also legal issues regarding the fact that the producing party's attorney emailed the documents to defendant's former attorney. Pursuant to CPLR § 3120(3), once a party has complied with a subpoena duces tecum, the party who originally served the subpoena must notify all other parties within five days and allow them to inspect and copy the items produced (CPLR § 3120(3)). This statute does not give the producing party the right to send the documents to all parties. In its reply, defendant relies on CPLR § 2103(e), which indicates that any document served on a party must be served on every party who has appeared (CPLR § 2103(e); Defendant's Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶ 25). However, there is a dispute as to whether Myron Winiarsky, Esq. was a party to the proceeding and whether he failed to appear in the action (Plaintiffs' Affirmation in Opposition to Defendant's Motion to Vacate Default ¶¶ 62, 63, 67-68). Defendant is also alleging that it obtained these documents through David Winiarski, defendant's sole member, who was a party to the discovery proceeding (Defendant's Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶ 26). However, the court does not know whether Mr. Winiarski ever appeared in the Surrogate's Court action. Under these circumstances, the court will not consider decedent's tax returns on defendant's motion to dismiss.

Plaintiffs' motion to suppress decedent's tax returns is denied with leave to renew. If the court granted plaintiffs' suppression motion, pursuant to CPLR § 3103(c), defendant would be permanently foreclosed from using decedent's tax returns. Given the fact that there has been no discovery in this case, the motion is premature, and the court declines to make a permanent ruling as to whether defendant may use the tax returns. Decedent's tax returns may be discoverable in this case, if defendant presents facts indicating that the tax returns are "indispensable to [its] claim, and [the information] cannot be obtained" through other means (*Latture*, 304 AD2d at 536; *Briton*, 111 AD2d at 62-63; *Weingarten*, 158 AD3d at 519-520).

Motion for Sanctions

Defendant's motion for sanctions is denied, as the plaintiffs did not engage in frivolous conduct. Plaintiffs have presented facts that indicate that the defendant may have improperly obtained decedent's tax returns. Defendant has failed to rebut plaintiffs' arguments, since there are issues of fact regarding whether Myron Winiarsky, Esq. was a party to the discovery proceeding, and whether Myron Winiarsky and David Winiarski appeared in the action. Defendant has not cited any cases or statutes that authorize an attorney or party to use discovery obtained in one action in another action.

Motion to Dismiss

Defendant's motion to dismiss, on the ground that "a defense is founded upon documentary evidence" is denied (CPLR § 3211(a)(1)). The only documentary evidence the court will consider is the 1995 deed, David & Esther Winiarski's tax returns, and the operating agreement for RNR Realty Group LLC. The issue is whether these documents "utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Qureshi*, 173 AD3d at 1077). The 1995 deed does not "utterly refute" plaintiffs' claim of ownership, since the deed conveyed the property from David Winiarski to RNR Realty Corp., a non-party (Exhibit D to defendant's motion papers, motion sequence 4). David & Esther Winiarski's tax returns for 2017 and 2018 also do not establish that RNR Realty Group LLC owns the whole building, since Schedule E merely reports rental income from property, and David & Esther Winiarski do not claim to own the property (Exhibit F to defendant's motion papers, motion sequence 4; IRS Rules, exhibit L to defendant's motion papers, motion sequence 4). The operating agreement also does not support defendant's claim of ownership, as it merely states that David Winiarski is the sole member of RNR Realty Group LLC (Exhibit E to defendant's motion papers, motion sequence 4). Defendant claims that it has established its "prima facie" "entitlement to judgment as a matter of law through, *inter alia*, the deed, operating agreement, Mr. Winiarski's tax statements and the decedent's tax statements," and cites to a similar case, *Luong v. Ha The Luong*, 67 Misc.3d 1210(A) [Sup Ct, NY County 2020] to support this contention (Defendant's

Affirmation in Reply to Motion to Vacate Default and in Reply to Motion to Dismiss ¶¶ 17-18).

However, in that case, the court found that the documentary evidence “utterly refute[d]” plaintiff’s claim of ownership in a corporation, an LLC, and in seven properties, based on the fact that plaintiff was not listed as an owner in the corporation’s tax returns, she also was not listed as a member in the LLC’s operating agreement, nor was her name on any of the deeds for the seven properties (*Luong*, 67 Misc.3d at *7). This case is different, since plaintiffs are not claiming an ownership interest in the LLC, and the deed is not in the name of a party. Therefore, defendant’s motion to dismiss is denied, since the documentary evidence does not “utterly refute” plaintiffs’ claim of ownership.

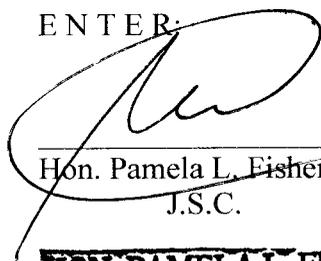
Motion to Cancel Notice of Pendency and for Costs

Lastly, defendant’s motion to cancel the notice of pendency, pursuant to CPLR § 6514(a), and for costs, pursuant to CPLR § 6514(c), is denied, since the court is denying defendant’s motion to dismiss. The notice of pendency is proper in this case, since a partition action is one that directly “affect[s] the title to, or the possession, use or enjoyment of, real property” (CPLR § 6501).

Conclusion

Defendant’s motion to vacate the default order dated March 5, 2020 is granted. Plaintiffs’ motion to suppress decedent’s tax returns is denied with leave to renew at a later time. Defendant’s motions for sanctions, to dismiss plaintiffs’ amended complaint, to cancel the notice of pendency, and for costs are denied.

This constitutes the decision and order of the Court.

ENTER:


Hon. Pamela L. Fisher
J.S.C.
HON. PAMELA L. FISHER