

Russo v Dante

2024 NY Slip Op 31110(U)

March 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 518868/2020

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of March 2024

HONORABLE FRANCOIS A. RIVERA

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ALEXANDRA RUSSO, AS ADMINISTRATOR
OF THE ESTATE OF MARCELLA GONZALES,

Plaintiff,

- against -

PHILIP DANTE, AS EXECUTOR OF THE ESTATE
OF JOHN PAUL CAPOBIANCO,

Defendant.

DECISION & ORDER

Index No.: 518868/2020

Ms. 3

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Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion filed on December 21, 2023, under motion sequence three, by defendant Philip Dante, as Executor of the Estate of John Paul Capobianco (hereinafter the defendant) moved for an Order pursuant to CPLR 4311: (1) scheduling a hearing on the second cause of action for an accounting on the verified complaint of Alexandra Russo, as Administrator of the estate of Marcella Gonzales (hereinafter the plaintiff) , with the hearing to be held either by this Court or by a Judicial Hearing Officer or Referee authorized to hear and report; and (2) precluding plaintiff from offering any documentary evidence or witness at said hearing not disclosed by plaintiff during discovery; and (3) directing plaintiff to post an undertaking, in an amount not less than \$270,000.00, equal to fifty (50%) percent of the costs already incurred by defendant to acquire and maintain the property, or such other sum as may seem just and equitable to this Court, as a condition of any partition sale which may be ordered after the hearing on plaintiff's second cause of action for an accounting; and (4) compelling plaintiff to pay the cost and expense of any partition sale which may be ordered pursuant to RPAPL 981, together with the discretionary surcharge of \$3,000 pursuant to CPLR 8303 (a)(3). The motion is opposed.

- Notice of motion
- Memorandum of law in support
- Affidavit in support
 - Exhibits A-P
- Memorandum of law in opposition
- Affidavit in opposition
 - Exhibit A

BACKGROUND

On October 5, 2020, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On November 4, 2020, defendant interposed and filed a verified answer with the KCCO. On August 25, 2022, plaintiff filed a note of issue.

The verified complaint alleged twenty-three allegations of fact in support of two causes of action. The first cause of action is for a partition and the second cause of action is for an accounting. The verified complaint alleges the following allegations of fact. Plaintiff is the Administrator of the Estate of Marcella Gonzales pursuant to a decree of the Surrogate's Court Kings County dated October 30, 2019, under index number 2019-3890. Defendant is the Executor of the Estate of John Paul Capobianco under Surrogate's Court Westchester County file number 2018-2627.

Plaintiff (Estate of Marcella Gonzales) and defendant (Estate of John Paul Capobianco) own as tenants in common, one thousand two hundred and forty shares (1,240) of 85 Livingston Corp and cooperative apartment number 17G located in the Borough of Brooklyn and County of Kings, City and State of New York, located at 85 Livingston Street, Apartment Number 17G, Brooklyn, New York 11201, also being known as Block 266, Lot 12, situated in the Borough of Brooklyn and County of Kings, City and State of New York.

The parties acquired the cooperative apartment by the acquisition of 1,240 shares of stock in 85 Livingston Tenants Corp, and an acceptance and assumption of a proprietary lease for apartment 17G on January 25, 1991. The parties do not own any other property in common. Plaintiff and defendant are each seized of a one-half (1/2) interest in the shares of the aforesaid cooperative corporation and apartment number 17G.

Plaintiff no longer wishes to be and remain a co-owner of this property with the defendant. The premises are so situated that a physical division between the owners according to their respective interests cannot be had without prejudice to the owners thereof. Plaintiff is desirous that a partition and division be had of said cooperative apartment known as 85 Livingston Street, Apartment 17G, Brooklyn, New York and because same cannot be divided among them without material injury to the parties' interest therein, divided among said parties according to their respective rights and interest.

Upon information and belief, the defendant has been accepting rent without paying expenses for the premises. Accounting is necessary with regard to the taxes, insurance, rent roll, maintenance, repairs, and other carrying costs related to the premises to ensure, among other things, that the defendant has paid the respective amounts obligated to pay in connection with the cooperative apartment located at 85 Livingston Street, Apartment 17G, Brooklyn, New York.

Under the principles of equity and good conscience, the defendant should not be permitted to retain all the money acquired by renting the premises. As a direct and proximate result of the cooperative unit being owned as tenants in common, plaintiff has suffered damages in an amount to be determined by an accounting.

LAW AND APPLICATION

A person holding and in possession of real property as joint tenant or tenant in common may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners (RPAPL 901[1]). "The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties" (*Goldberger v Rudnicki*, 94 AD3d 1048, 1050 [2d Dept 2012]; see *Arata v Behling*, 57

AD3d 925, 926 [2d Dept 2008]). “The right to partition is...absolute in the absence of countervailing conditions...[and therefore] such issues as the interest of the parties and whether partition may be had without great prejudice should first be determined” (*Bentley v Dox*, 12 AD3d 1187 [4th Dept 2004], quoting *Grossman v Baker*, 182 AD2d 1119, 1119 [1992]).

Partition “is an equitable remedy in nature and the Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits” (*Khotylev v Spektor*, 165 AD3d 1088, 1089 [2d Dept 2018] quoting *Brady v Varrone*, 65 AD3d 600, 602 [2d Dept 2009]). “Further, because a partition action is equitable in nature, an accounting is a necessary incident thereto” (*Khotylev*, 165 AD3d at 1090, quoting *Tedesco v Tedesco*, 269 AD2d 660, 661 [3d Dept 2000]).

Defendant Philip Dante, as Executor of the Estate of John Paul Capobianco has moved for an Order pursuant to CPLR 4311 scheduling a hearing on the second cause of action for an accounting. He also seeks an order precluding plaintiff from offering any documentary evidence or witness at said hearing not disclosed by plaintiff during discovery. He seeks an order directing plaintiff to post an undertaking, in an amount not less than \$270,000.00 or such other sum as may seem just and equitable to this Court, as a condition of any partition sale which may be ordered after the hearing. He also seeks an order compelling plaintiff to pay the cost and expense of any partition sale which may be ordered pursuant to RPAPL 981, together with the discretionary surcharge of \$3,000 pursuant to CPLR 8303 (a)(3).

Plaintiff does not oppose defendant’s motion for an order pursuant to CPLR 4311 scheduling a hearing on the second cause of action for an accounting, but opposes all other relief requested in the motion.

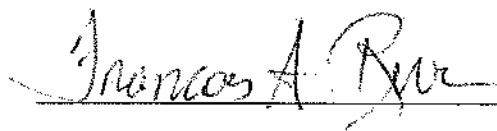
The plaintiff's apparent consent to an order pursuant to CPLR 4311 scheduling a hearing on the second cause of action for an accounting, is nevertheless premature. Although an accounting is a necessary incident to a partition action, the predicate for the accounting is an order directing a partition and sale. No such order has been issued in this action. While both sides had previously filed summary judgment motion seeking such relief, both summary judgment motions were denied as untimely filed. Plaintiff must proceed to trial to establish his entitlement to a partition and accounting.

CONCLUSION

The motion by defendant Philip Dante, as Executor of the Estate of John Paul Capobianco for an order pursuant to CPLR 4311 scheduling a hearing on the second cause of action for an accounting on the verified complaint of Alexandra Russo, as Administrator of the estate of Marcella Gonzales and for other related relief is denied in its entirety.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOISA RIVERA