

**Gabay v Bender**

2006 NY Slip Op 30534(U)

March 29, 2006

Supreme Court, New York County

Docket Number: 604159/02

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Justice

GABAY

INDEX NO. 604159-02

MOTION DATE 3/29/06

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

BENDER

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
APR 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Based on the accompanying Memorandum Decision and the oral argument incorporated herein, (Transcript dated March 29, 2006, John A. Bonaccolta, Reporter) it is hereby

ORDERED that the Referee Helene Blank shall immediately have the locks of the Property changed and provide each co-owner with a set of keys to said Property. It is further

ORDERED that the Referee Helene Blank shall ensure that each co-owner shall continue to have full access to the Property and Units therein. It is further

ORDERED that attorneys' fees and costs incurred by the plaintiff in this proceeding to obtain access to the Property against defendant is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and Helene Blank within 20 days of entry.

Dated: This constitutes the decision and order of the court.

3/29/06

J.S.C.

HON. CAROL EDMEAD

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 35

x

VICKY R. GABAY,

Plaintiff,

Index No. 604159/02

-against-

**DECISION/ORDER**

MOLLY BENDER, Individually and as Executrix of the  
 Estate of William Gottlieb,

Defendant.

EDMEAD, J.S.C.

**MEMORANDUM DECISION**

**FILED**  
 APR 06 2006  
 NEW YORK  
 COUNTY CLERK'S OFFICE

In this property partition action, the plaintiff, Vicky R. Gabay ("plaintiff"), moves by order to show cause, for an order directing the defendant, Molly Bender, individually and as Executrix of the Estate of William Gottlieb ("defendant"), to immediately provide the plaintiff with a set of keys to the residential apartment building (e.g., common areas, vacant units and occupied units), located at 79 Horatio Street, New York, New York ("Property"), awarding the plaintiff attorneys' fees and costs for this application, and imposing sanctions for defendant's and her counsel's frivolous conduct within the meaning of 22 NYCRR Part 130. Defendant opposes the motion and argues that the plaintiff's motion is "meritless in all respects."

**Background**

Defendant's brother, William Gottlieb, died in 1999. The plaintiff and Mr. Gottlieb owned the Property jointly as tenants in common. On November 14, 2002, the plaintiff commenced the present action against defendant seeking a partition of the Property and an accounting.

By a Decision dated January 21, 2005, and a Judgment and Order dated April 13, 2005, the Honorable Diane A. Lebedeff, pursuant to CPLR 3212, granted the plaintiff's motion for partial summary judgment on its second cause of action in its complaint and, *inter alia*, pursuant to RPAPL § 901, directed partition and sale of the Property. Justice Lebedeff's Memorandum Decision determined that the plaintiff and Ms. Bender, as executrix of the estate of William Gottlieb, each own an undivided one-half interest in the Property. Justice Lebedeff also appointed a Special Referee to oversee the partition sale and accounting. The Memorandum Decision provides, in part, as follows:

The matter is referred to a referee [Helene Blank] to conduct a search for creditors or the presentation of an alternative search for creditors as certified by the clerk and/or Register (10 Warren's Weed New York Real Property § 7.19 [2002] at § 8.06). The parties shall also present their appraisals of the property to the referee, who is empowered to determine whether any further appraisal need to be ordered and, if so, to order such appraisal. The referee is also empowered to supervise any discovery necessary to the accounting issues raised between the parties, to conduct an accounting, and to withhold distribution of up to 1/3 of the proceeds of any sale prior to completion of the accounting.

Following an appeal by defendant, on December 6, 2005, the Appellate Division, First Department affirmed Justice Lebedeff's Decision and Judgment and Order. Said decision held, in part:

"A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners." (RPAPL 901[1]; *see Bufogle v Greek*, 152 AD2d 527 [1989]). While the right to maintain an action for partition is not absolute (*see Kopsidas v Krokos*, 294 AD2d 406 [2002]); *Ripp v Ripp*, 38 AD2d 65 [1971]), *affd* 32 NY2d 755 [1973]), the court properly found that no factual issue had been raised respecting defendant's equitable defenses to the partition sought by plaintiff. We have considered defendant's remaining contentions and find them unavailing.

*The Keys*

The issue of the keys and access to the Property was raised in correspondence between the parties from 2000 through the present, recent emails between counsel and Referee Helene Blank, and during a telephone conference with Referee Blank on March 21, 2006.

The issue with the keys first arose in 1999, after William Gottlieb's untimely death. Plaintiff and her husband temporarily misplaced their set of keys to the Property. They requested the defendant and/or her agent, Michael Wu, provide them with a replacement set, to no avail. When plaintiff and her husband later found their set of keys to the Property, none of their keys worked, save the key to the front door. Plaintiff and her husband discovered that defendant had apparently changed several of the locks at the Property. Defendant has refused to provide plaintiff and her husband with a replacement set of keys to the Property.

On March 2, 2006, plaintiff's counsel requested a telephone conference with Referee Blank to discuss several issues, including defendant's refusal to provide plaintiff with a set of the keys to the apartments at the Property.

By email dated March 7, 2006, Special Referee Helene Blank directed defendant's counsel, Allan Carlin, to deliver the keys to the Property to the plaintiff's counsel before the close of business on March 8, 2006. By email dated March 8, 2006, Mr. Carlin responded to Referee Blank's directive by stating, "I do not believe ... that you have the power to order my client to deliver the keys to the property to the plaintiff's counsel." Mr. Carlin did not deliver the keys to the plaintiff's counsel.

Following several days of correspondence between the parties and Referee Blank, in an email dated March 17, Referee Blank, in pertinent part, advised the parties as follows:

[the court's] Order empowers me to make all necessary decisions to bring this litigation to an end – [the court] agrees with me that the defendants must turn over a set of keys to the plaintiff. [The court] has been apprised of all of the defendant's objections to doing so, but feels that since the plaintiff is a 50% owner the objections have no merit.

After a series of exchanges, on March 8, 2006, defendant's counsel advised Referee

Blank by email as follows:

“[d]elivery of the keys....is unnecessary” because Defendant will magnanimously provide Plaintiff with supervised access with reasonable notice.”

### Contentions of the Parties

#### *Plaintiff's Contentions*

Plaintiff argues that consistent with defendant's refusal to cooperate or communicate with plaintiff after defendant's brother's death, defendant flatly continues to refuse to provide plaintiff with replacement keys to the Property. To date, defendant has literally locked plaintiff and her husband out of plaintiff's own Property for no legitimate reason.

Defendant has no right or legitimate basis to exclude plaintiff and her husband from the Property, as a matter of law, because the plaintiff and defendant own the Property as tenants in common. As such, plaintiff is entitled to reasonable access of the Property without interference by the defendant.

Defendant's argument that it would be “unfair” for plaintiff to maximize the sales price of the Property by showing it to third party real estate brokers prior to the partition sale because defendant intends to bid on the Property herself at the partition sale is baseless. Defendant may not deny plaintiff access to the Property in order to keep the bidding price low so that she may purchase the Property below the market value.

It is entirely appropriate for plaintiff to retain a real estate broker to market the Property

prior to the partition sale in an attempt to maximize the purchase price of the Property at public auction.

*Defendant's Contentions*

Defendant generally contends that the court's prior order in this case "does not, by its terms, empower the Referee to make any decision concerning any issue with respect to the use, occupancy or possession of the Property, including, but not limited to, access or possession of keys." Defendant also argues that the plaintiff seeks keys to the Property in order to show the Property to real estate brokers, which, according to defense counsel, "the laws do not contemplate." Further, defendant asserts that no basis exists for expansion of the procedures for a partition sale beyond those codified in the governing statute or any applicable rules. Moreover, defendant argues that allowing access to brokers or any third parties presents a very serious safety risk which defendant is not willing to assume, and creates a very serious security risk, which, again, defendant is not willing to assume.

More specifically, as to Referee Blank's authority, defendant contends that no basis exists under the Interlocutory Judgment and Order entered in this case for the plaintiff to request that Referee Blank direct the defendant to deliver a set of keys, or for the Referee Blank to make any such direction to the defendant. Defendant asserts that Referee Blank's representation in her March 17, 2006, 11:28 a.m. email, which stated that she was "empowered to make all necessary decisions to bring this litigation to an end," is not provided for in the Interlocutory Judgment and Order. Furthermore, defendant argues that, pursuant to Article 43 of the CPLR, the court does not have the authority to grant a referee the broad and general decision-making powers, which were purportedly granted to Referee Blank in this case.

On the issue of whether the court should grant the plaintiff's motion for an order to have the defendant turn over the keys, defendant contends that the reason given by the plaintiff for wanting the keys is not a proper basis for judicial action as a matter of law. Defendant asserts that the plaintiff obtaining the keys "for the purpose of showing the Property to brokers" would violate defendant's fundamental common law rights and would also be contrary to the prior Interlocutory Judgment entered in this case. Defendant notes that the United States Supreme Court has recently held that one co-owner of property does not have superior rights over the other co-owner, and that where parties are unable to resolve their disagreements, the law provides the remedy of partition of the property in question and termination of the relationship. Consequently, defendant asserts that the Supreme Court ruled that one co-owner of real property has the absolute right to refuse the other co-owner's desire to permit a third-party's access to the property. Moreover, if the plaintiff objected to the method of selling the Property outlined in the Interlocutory Judgment and Order, defendant argues that she should have objected at the proper time.

Furthermore, defendant contends that the plaintiff's motion seeking an order to obtain the keys to the interior apartments in the Property serves no valid purpose, and amounts to "nothing more than the plaintiff obtaining keys for the sake of obtaining keys." According to the affidavit of Michael Wu, the Director of Operations for William Gottlieb Real Estate Company and defendant's agent, defendant has solely managed the Property for decades in reliance upon the practice and agreement of the parties that defendant would have exclusive possession of the keys to the interior units of the property. Mr. Wu also avers that the plaintiff has not been involved in the day-to-day management of the Property, has been a passive investor throughout her period of

co-ownership of the Property, and has not possessed keys to the individual apartment units in the Property. Defendant asserts that the plaintiff has presented no basis for either rescinding or reforming this agreement among the co-owners. The defendant argues that this attempt by the plaintiff to acquire said keys goes against the agreement of the parties that placed the exclusive possession of the keys to the apartment units in the Property with the defendant. Additionally, in light of defendant's and Mr. Wu's allegations that several apartments in the Property are in a state of disrepair, defendant argues that she should not expose herself to a risk of liability and a lawsuit by allowing the plaintiff to enter the interior apartments in the Property, potentially causing injuries to herself or any invited third-parties.

### Analysis

#### *Authority of the Referee*

To begin, there can be little dispute that it is the court, and not the parties, who is in absolute control of the workings of a partition sale. The appointed Referee is an officer of the court and must perform her duties impartially without regard to the interests of any particular person in the proceeding (*see, e.g., National Bank of Stamford v Van Keuren*, 184 A.D.2d 92, 95, 590 N.Y.S.2d 946 [citations omitted]). And, a Referee, like a Receiver, as an officer of the court, is subject, at all times, only to its direction and control and acting merely as its arm.

A referee has the discretion to do that which is reasonable and within the authority conferred in the order of partition in order to ensure a successful sale (*see, e.g., Glenville & 110 Corp. v Tortora*, 137 A.D.2d 654, 524 N.Y.S.2d 747; *E.Q.C. Co. v Plainview Country Club*, 23 A.D.2d 769, 258 N.Y.S.2d 567).

A referee must retain limited flexibility, while still acting within the authority of the court as conferred in the order of partition, to meet those unforeseen circumstances that might otherwise jeopardize the success of a sale (*see, e.g., E.Q.C. Co. v Plainview Country Club, supra; cf., F.L.E.T. Co. v B.M. Tel. Co.*, 119 N.Y. 15, 23 N.E. 173).

While the appointing order did not specifically authorize the Referee to direct that each co-tenant have a set of key to the Property, the Referee was acting within the scope of the court's order, to wit: "The parties shall also present *their* appraisals of the property to the referee, who is empowered to determine whether any further appraisal need to be ordered and, if so, to order such appraisal." Defendant's refusal to comply with the directive of the Referee in this instance frustrates the letter and the spirit of the order of Justice Lebedeff and the determination of the First Department.

Further, such refusal frustrates the right of the plaintiff, as co-owner, to secure an independent appraisal.

#### *Partition: Right of Co-Owners*

It cannot be disputed that each tenant in common holds his title and interest independently of the other tenants in common. A tenant in common, therefore, can convey his interest to another person or persons, and, upon that conveyance one tenancy in common is terminated and a new one arises among the new tenants in common (*Anonymous v. Anonymous*, 2 Misc.3d 1002, 784 N.Y.S.2d 918 [NY Sup 2004]).

Tenants in common are competent to agree among themselves that one of them shall have exclusive possession of the common property (*Butler ex rel. Butler v. Rafferty*, 100 N.Y.2d 265,

792 N.E.2d 1055 [2003]). However, in the absence of an agreement to the contrary, a joint tenant, can exercise its unilateral right to partition (*see*, 3 Rasch, New York Law and Practice of Real Property §§ 40:2-40:3, at 140-141 [2d ed]). In this regard, a partition is “the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interests therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed according to the respective interests (24 N.Y.Jur.2d, *Cotenancy and Partition*, § 116, p. 376). It is an action between tenants in common or joint tenants and may be effected voluntarily by mutual consent of the parties or by judicial order upon the application of one or more co-owners (*id.*).

Specific statutes governing the judicial partition of estates in real property have existed in this country since the time of the colonial governments. Indeed, so ancient is the history of judicial partitions, and so favored are partitions that it is now beyond contention that, independent of any statute, a court of equity has the inherent power to issue a decree of partition or require the sale of jointly owned property (*Hewlett v Wood*, 62 N.Y. 75, 76; *Croghan v Livingston*, 17 N.Y. 218, 220; *Mead v Mitchell*, 5 Abb Prac. 92, *aff'd* 17 N.Y. 210; *Baldwin v Baldwin*, 74 Hun 415, 417-418). A partition however, once ordered, puts an end to the tenancy (*see*, 3 Rasch, New York Law and Practice of Real Property §§ 40:2-40:3, at 140-141 [2d ed]).

*Deeb v. Goryeb* (258 A.D. 93, 15 N.Y.S.2d 617 [1st Dept. 1939]) provides some guidance as to the issue regarding an agreement between tenants in common in relation to a partition. In *Deeb*, a joint venture agreement was executed by the parties as tenants in common of a leasehold and contained provisions governing the management of the property during the

term of the lease. The court held that the agreement that defendant was to manage the property was of no financial value because it is specifically provided therein that neither of the parties thereto should receive any compensation for services rendered in connection with the property. There was nothing in the contract binding either party not to demand a partition. Continuing, the Court stated that as a joint venture the arrangement could be terminated by either party at will (*Armstrong v. Rickard*, 199 App.Div. 880, 192 N.Y.S. 502; *Burnstine v. Geist*, 257 App.Div. 792, 15 N.Y.S.2d 48). And, as tenants in common, there is a statutory right to partition at any time, Real Property Law, § 532, and the breach of a collateral agreement governing the management of the property would constitute no defense thereto.

Analogously, if either party to a written joint venture agreement concerning the management of the premises can terminate the agreement at will and seek a partition, then the plaintiff here can likewise terminate the purported oral arrangement that gave defendant managing rights to the premises and seek partition, which in this case, was granted. Therefore, the purported oral arrangement to permit defendant exclusive rights to the keys to the Units in the Premises is not a defense to this Court's direction in this action for partition, to permit plaintiff equal access to the units via the keys to the Premises and the Units therein.

Defendant's "magnanimous" offer to allow plaintiff - a co-owner - access, on notice, is anything but. Defendant's "offer" is wholly inadequate and without basis in law, fact or logic. As Judge Lebedeff ruled: "Plaintiff and defendant Molly Bender, as executrix of the Estate of William Gottlieb, each own an undivided one-half interest in the property...." As a tenant in common, plaintiff is entitled to reasonable access of the Property without interference

by the defendant. At no time has defendant been deemed - as a matter of law - to be the controlling co-owner. Plaintiff is entitled to full, unfettered access to the Property, as is defendant.

Further, although not provided for in Judge Lebedeff's decision/order, the court may, and this court hereby does, permit plaintiff to retain a real estate broker to market the Property prior to the partition sale in an order to maximize the purchase price of the Property at public auction. (*See, Deitz v Deitz*, 245 AD2d 638 [3<sup>rd</sup> Dept 1997] "... Supreme Court determined that the premises were incapable of being partitioned and, accordingly, directed the parties to retain a real estate broker, specified by the court, to immediately place the premises on the open market for sale.")

Defendant's argument that because access to brokers or any third parties presents a very serious safety and security risk constitutes a basis to deny full access to plaintiff and, if plaintiff chooses, access by plaintiff's broker, is insufficient to preclude equal access to plaintiff.

*22 N.Y.C.R.R. § 130-1.1(a) Sanctions and Costs*

Plaintiff also seeks the imposition of sanctions, attorneys' fees and costs associated with this application, pursuant to 22 NYCRR Part 130, against defendant and her counsel, Allan H. Carlin, for frivolously refusing to provide plaintiff with keys to the Property, as repeatedly requested by the plaintiff and her husband, and as ordered by Referee Helene Blank.

Part 130 of the Rules of the Chief Administrator (22 NYCRR § 130-1.1 and following) contains the pertinent provisions relating to the issue of costs and sanctions now before the

Court.<sup>1</sup>

22 NYCRR 130-1.1(b) defines frivolous conduct for purposes of costs or sanctions to be imposed against a party who engages in frivolous conduct in civil litigation as conduct that “is completely without merit in law” and “undertaken primarily to ... harass ... another.”

Our courts have an interest in preventing the waste of judicial resources by a party who knows that his actions in a proceeding have no legitimate basis in law or fact and continues to require judicial intervention to state the obvious. *Martin-Trigona v Capital Cities/ABC, Inc.*, 145 Misc.2d 405 (Sup Ct, New York County 1989). Thus, a party’s persistent contumacious behavior can be extremely costly to the other party and can waste an inordinate amount of court

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<sup>1</sup>§ 130-1.1 Costs; Sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion, may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon an attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct 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.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) 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.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

time, time that the trial courts can ill afford to lose (see *Harrelson v United States*, 613 F.2d 114).

This court has repeatedly rejected requests to impose sanctions in these often heated litigations. The court does not relish increasing animosities between parties and penalizing attorneys. Sanctions and costs are called for only in extreme circumstances.

That being the case, costs and attorneys' fees are inappropriate in this action (22 NYCRR 130-1.1). Although the defendant's refusal to provide plaintiff access to the Property lacks merit, the prior practice of permitting safely the defendant to utilize the keys to the Premises is undisputed, even though such practice can no longer continue or justify denial of the keys to plaintiff.

#### Conclusion

Based on the foregoing, and the oral argument (Transcript dated March 29, 2006, John A. Bonaccolta, Reporter) it is hereby

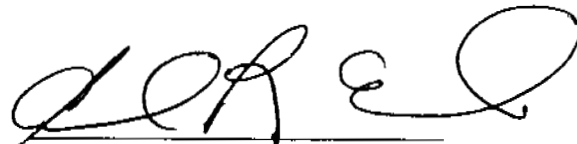
ORDERED that the Referee [Helene Blank] shall immediately have the locks of the Property changed and provide each co-owner with a set of keys to said Property. It is further

ORDERED that the Referee [Helene Blank] shall ensure that each co-owner shall continue to have full access to the Property and Units therein. It is further

ORDERED that attorneys' fees and costs incurred by the plaintiff in this proceeding to obtain access to the Property against defendant is denied; and it is further

This constitutes the decision and order of the court.

Dated: March 29, 2006



Carol Robinson Edmead, J.S.C.

**CAROL EDMED**  
**J.S.C.**

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