

George v Wightman

2007 NY Slip Op 31878(U)

June 20, 2007

Supreme Court, Suffolk County

Docket Number: 0019437/2005

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MELLINA GEORGE,

Plaintiff,

-against-

JAMES J. WIGHTMAN and WELLS FARGO
HOME MORTGAGE, INC.,

Defendants.

ORIG. RETURN DATE: MARCH 28, 2007
FINAL SUBMISSION DATE: APRIL 5, 2007
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: MARCH 28, 2007
FINAL SUBMISSION DATE: APRIL 5, 2007
MTN. SEQ. #: 002
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 9 read on this motion and cross-motion
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-
motion and supporting papers 5-7; Affidavit in Opposition and supporting papers 8, 9; it is,

ORDERED that this motion by defendant JAMES J. WIGHTMAN
("defendant") for an Order granting summary judgment to defendant; directing
plaintiff to execute a deed and all ancillary documents to transfer title to the
subject premises to defendant; and granting defendant a money judgment
against plaintiff in the amount of \$3,016.16, with interest from October 1, 2005, is
hereby **DENIED**; and it is further

ORDERED that this cross-motion by plaintiff for an Order, pursuant to CPLR 3212(a) and 3212(e), granting plaintiff partial summary judgment and appointing a referee to conduct a sale of the subject property, and to hear and report to the Court regarding the respective equities and interests of the parties herein, is hereby **GRANTED** to the extent provided herein.

This is an action for the partition of certain real property located at 11 West Smith Street, Amityville, New York. Pursuant to a deed dated April 1, 1994, the property is owned by plaintiff and defendant as joint tenants with the right of survivorship. Plaintiff and defendant were never married, but they lived at the premises together for approximately six months before plaintiff vacated in or about October of 1994. The reasons for plaintiff's departure are contested. During the initial six months, defendant acknowledges that the parties equally split all costs and expenses associated with the premises, but since that time, defendant alleges that he has been paying all the costs and expenses without contribution from plaintiff. Defendant also alleges that on or about July 24, 2002, at a refinance of the first mortgage, defendant paid plaintiff the sum of \$2,000.00 as consideration to transfer the property to his name only. Plaintiff contests this purported arrangement.

Defendant now moves for summary judgment, seeking an Order directing plaintiff to execute a deed and all ancillary documents to transfer title to the property to defendant, and granting defendant a money judgment against plaintiff in the amount of \$3,016.16, with interest from October 1, 2005. Defendant has submitted an accounting of all the payments made, and rentals received, by defendant as of the commencement of this action in October of 2005. Defendant alleges that the parties agreed to be bound by the value of the premises as determined by a neutral appraiser, Breslin Appraisal Co. Inc., which determined that the market value of the premises as of August 29, 2005 was \$225,000.00. The Court notes that defendant has not submitted any formal writing memorializing this agreement, and that the appraisal submitted is now approximately two years old. Utilizing the aforementioned accounting and appraisal value of the property, defendant argues that after netting out plaintiff's share of the equity in the property, plaintiff still owes defendant \$3,016.16, and seeks a money judgment against plaintiff for that amount.

In opposition, plaintiff has filed a cross-motion seeking partial summary judgment partitioning the real property in question, and appointing a referee to conduct a sale of the property and to hear and report to the Court regarding the respective equities and interests of the parties. Plaintiff argues that

there exists no statute or case law which would compel plaintiff to deed the property to defendant, nor award a money judgment against plaintiff in the absence of a hearing before a referee. Moreover, plaintiff argues that she was ousted from the premises by defendant, which would entitle her to recover fair rental value as an offset against any expenditures defendant made for the purpose of preserving the property.

RPAPL Article 9 governs actions for partition. RPAPL 901 provides in pertinent part that “a person holding and in possession of real property as joint tenant . . . 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]). While it has been held that the right of partition is not absolute and may be precluded by the equities present in a given case (see e.g. *Ferguson v McLaughlin*, 184 AD2d 294 [1992]; *Barol v Barol*, 95 AD2d 942 [1983]), it does not appear from this record that there are equitable reasons to prevent partition. Although it does appear that defendant may have attempted to purchase the property from plaintiff, that purchase did not occur. It also appears that the property that is subject to this partition action is improved by a single family residence. Consequently, the partition of said residence between the owners would most likely result in great prejudice to the owners.

In view of the foregoing, defendant’s motion for summary judgment directing the property be transferred to defendant, and for a money judgment against plaintiff, is denied in the absence of any statutory or case law authority presented for such relief. Further, as it appears that the rights of plaintiff and defendant in the subject property are not controverted, plaintiff’s motion is granted to the extent that:

(a) JAMES A. MCDONAUGH, ESQ., having offices at 165 South Wellwood Avenue, Lindenhurst, New York 11757 (631-226-2100), is appointed referee in this action, pursuant to RPAPL 911, to ascertain the rights, shares and interests of the parties in the property described in the Complaint and of which partition is sought, to ascertain whether partition of said property is necessary and to report whether the property, or any part of the property, is so circumstanced that a partition of the property cannot be made without great prejudice to the owners;

(b) If the referee concludes that partition or a sale of the property is necessary, then the referee shall ascertain whether there is any creditor, not a party to the action, who has a lien on the undivided share or interest of either

party in the property and shall, in accordance with RPAPL 913, cause a notice to be published once a week for four successive weeks in Newsday, a newspaper published in Suffolk County, which is the County in which the property is situated, requiring each person not a party to the action, who has a lien upon either undivided share or interest of any party in the property, to appear before the referee at a time and place to be fixed by the referee, to prove his or her own interest. The referee is also empowered to supervise any discovery attendant to any accounting issues raised between the parties; and

(c) The referee shall report to the Court as soon as possible the name of each creditor whose lien is satisfactorily proved, the nature and extent of the lien, the date of the lien and the amount due or to become due on the lien.

Prior to the hearing before the referee, plaintiff shall serve upon the referee a "search certified by the clerk" of Suffolk County of any and all liens outstanding against the property.

By accepting this appointment, the referee shall certify that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to section 36.2(c) ("disqualification from appointment"), and section 36.2(d) ("limitations on appointments based upon compensation").

The referee shall submit an affirmation of legal services to the Court for review when submitting his report. The referee's legal fee shall be paid by plaintiff. In the event that the property is sold, then the plaintiff may seek reimbursement from the proceeds of the sale.

Plaintiff's application for a public sale of the subject premises will be held in abeyance pending the submission of the referee's report. In view of this decision, the pretrial conference currently scheduled for **June 28, 2007** is hereby cancelled.

The foregoing constitutes the decision and Order of the Court.

Dated: June 20, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court