

Ulrich v Harding

2007 NY Slip Op 32035(U)

January 31, 2007

Supreme Court, Tioga County

Docket Number: 0033022/2007

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 9th day of November, 2006

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

Ricky W. Ulrich,

Plaintiff,

DECISION AND ORDER

vs.

Index No. 33022
RJI No. 2006-0291-C

Jessie M. Harding,

Defendant.

APPEARANCES:

George C. Awad, Jr., Esq.

Attorney for Plaintiff

171 Main Street

P.O. Box 507

Owego, NY 13827

David M. Crowley, Esq.

Shaw, O'Brien, Crowley & Reynolds

Attorneys for Defendant

55 Main Street

Binghamton, NY 13905

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the defendant Jessie M. Harding's motion for summary judgment on her counterclaim for partition. The plaintiff Ricky W. Ulrich opposes the motion.

Mr. Ulrich commenced this action against Ms. Harding seeking payment of a check received from an insurer of property co-owned by the parties. The insurance check was issued after the property suffered water damage resulting from a leaking roof. The action also seeks damages based on the failure to turn the check over to Mr. Ulrich, and the consequential inability to repair the premises, and for Ms. Harding's failure to contribute to the expenses of the property. Ms. Harding essentially denies the allegations of the complaint and counterclaimed for partition.

The parties purchased the subject property, which is located at 48 Temple Street in the Village of Owego, from Tioga County in 1996. They apparently both lived there at some point. Ms. Harding moved out of the premises in 2001. Mr. Ulrich continues to live there and has been responsible for payment of expenses of the property since then. Both Mr. Ulrich and Ms. Harding are record owners of the property.

Ms. Harding's motion is premised on the position that whatever other disputes there may be between the parties, there is no dispute that they are both record owners of the property and that she no longer wishes to continue in that capacity with Mr. Ulrich. She asserts that there are no material issues on fact on this point and she is therefore entitled to summary judgment on her counterclaim for partition.

Mr. Ulrich opposes the motion, stating that granting Ms. Harding's motion would render any judgment he might receive on his claim meaningless, since her interest in the property would

not then be available to satisfy any judgment he obtains against her. He also points out that the mortgagees have not been joined as necessary parties to this action.

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

“It is well settled that a tenant-in-common of real property may maintain an action for the partition and for the sale of the property if it appears that partition alone cannot be made without great prejudice to the owners” (*Wilbur v. Wilbur*, 266 AD2d 535, 535-536 [2d Dept 1999], *Rosen v. Rosen*, 78 AD2d 911, 912 [3d Dept 1980]; *see* RPAPL §901[1]). Where there are no triable issues of fact regarding a party’s right to possession of the property, then entitlement to partition has been established.

Here, it is undisputed that the property in question cannot be physically divided or split.¹ Where this is shown, the party seeking partition has established entitlement to sale of the property at public auction (*Donlon v. Diamico*, 33 AD3d 841 [2d Dept 2006]).

In opposition to the motion, Mr. Ulrich also argues that Ms. Harding has not joined the mortgage holders, who he asserts are necessary parties.² While the mortgage holders may be made a party to a partition action, they are not necessary parties (*see* RPAPL §904(2); *see Roberts v. Walker*, 28 AD2d 1146, 1147 [3d Dept 1967]).

For the foregoing reasons, defendant's motion for summary judgment on her counterclaim for partition is granted. Defendant's attorney shall submit an order providing for the appointment of a referee to: (1) take proof of the capital improvements, repairs, taxes, insurance, and all other expenditures made by either party in connection with maintaining the value of said property; (2) report whether a further reference pursuant to NY RPAPL §913 may be dispensed with; (3) ascertain whether there is any creditor not a party to this action who has a lien on the undivided share or interest of either party, and if so, report the name of each such creditor and the nature, extent, date, and amount of the lien; and (4) conduct a sale of the property.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date

¹

Both attorneys agreed at oral argument that the property could not be physically divided.

²

There are two mortgages against the property.

below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: January 31, 2007
Binghamton, New York

A handwritten signature in black ink, appearing to read "Jeffrey A. Tait", written in a cursive style.

HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Tioga:

- Notice of Motion for Summary Judgment of Shaw, O'Brien, Crowley & Reynolds
- Affidavit of David F. Crowley, Esq., sworn to September 29, 2006, Affidavit of Jessie M. Harding, sworn to October 3, 2006 together with attached Exhibits A through D
- Affidavit of Ricky W. Ulrich sworn to November 2, 2006, Affidavit of George C. Awad, Jr., Esq., sworn to November 2, 2006 together with attached Exhibits A through C