

Gerardi v McGlone

2007 NY Slip Op 33264(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 1521-07/

Judge: Thomas P. Phelan

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

By: Justice Thomas P. Phelan

IAS PART 7

THOMAS D. GERARDI, JR. individually and
as ADMINISTRATOR OF THE ESTATE OF
THOMAS D. GERARDI, DECEASED,

NASSAU COUNTY
INDEX NO. 001521/07

Plaintiff,

ORIGINAL MOTION DATE: 07/31/07
SUBMISSION DATE: 08/17/07

- against -

JAY RODERICK McGLONE, CHRISTINA
McGLONE, ROBERT GERARDI, PATRICIA
McGLONE, DESIREE BERNHARD, ANGELO
BASSO, J.P. MORGAN CHASE BANK f/k/a
JP MORGAN CHASE BANK as TRUSTEE FOR
BS ABS 20030AC4,

MOTION SEQUENCE #1,2

Defendant(s).

This motion [sequence #1] by plaintiff Thomas D. Gerardi, Jr., individually and as Administrator of the Estate of Thomas D. Gerardi, Deceased, for an order pursuant to CPLR 3212 granting him summary judgment, *inter alia*, ordering that the premises known as 106 Lockwood Avenue, Farmingdale, New York, be sold at public sale; for an order pursuant to RPAPL § 911 appointing a referee to ascertain the rights, shares and interests of the several parties in the subject property; to take proof of plaintiff's title and interest in the subject property and of the several matters set forth in the complaint; to ascertain whether the subject property or any part of it is so circumstanced that its actual partition cannot be made without great prejudice to the owners; to take an account of the rents of said property; and, to direct such other and further relief as the court deems proper; and, for an order pursuant to RPAPL § 913 dispensing with a reference to ascertain whether there is any creditor not a party who has a lien on the undivided shares or interest of any party to this action, is determined as provided herein.

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This cross-motion [sequence #2] by defendants Jay Roderick McGlone, Christina McGlone and Robert Gerardi for an order pursuant to CPLR 2004, 3025(b) granting them leave to amend their Answer; an order pursuant to CPLR 3211(a)(3) dismissing the complaint for plaintiff's want of standing; an order pursuant to CPLR 3211(a)(4) dismissing or staying this action on account of another action pending; and, an award of counsel fees, is denied.

In this action, plaintiff Thomas Gerardi, Jr., seeks partition of 106 Lockwood Avenue, in Farmingdale, N.Y. Plaintiff alleges that the most recently filed deed reflects that his father, Thomas Gerardi, and defendant, Jay Roderick McGlone [Jay McGlone] took title to that property as tenants in common on May 15, 2003; that Thomas Gerardi died intestate on July 19, 2005; and, that pursuant to EPTL § 4-1.1, Thomas Gerardi's sole heirs and distributees -- his six children, plaintiff Thomas Gerardi and defendants Christina McGlone, Robert Gerardi, Patricia McGlone, Desiree Bernhard and Angelo Basso -- inherited decedent's interest in the property by operation of law. Plaintiff alleges that pursuant to Article 6 of the EPTL, all of the distributees share equally in Thomas Gerardi's interest in the property. Thus, plaintiff alleges that the Gerardi heirs and defendant Jay McGlone are seized and possessed in fee as tenants-in-common of the property. Defendant Jay McGlone holds a one-half interest and the Gerardi heirs hold a one-half interest, giving each of the heirs a 1/12 interest in the property. Defendants Jay and Christina McGlone are married and live at the property with their four children.

Plaintiff Thomas Gerardi Jr. further alleges in support of his application that his relationship with defendants Jay McGlone, Christina McGlone and Robert Gerardi has disintegrated to the point where they do not speak; thus, plaintiff alleges that the property can no longer be owned by all of them. He further alleges that since the property is a single family home in which Jay and Christina McGlone live, partition is not a viable option. Defendants Basso, Bernhard and Patricia McGlone in fact acquiesce in the relief sought by plaintiff.

In opposition to plaintiff's motion, defendants Jay McGlone, Christina McGlone and Robert Gerardi all attest that Jay and Christina McGlone and their children lived at the home with the decedent Thomas Gerardi for years and that Jay and Christina McGlone always paid or funded "pretty much any and all costs, bills and expenses" in maintaining the house. They further attest that it was decedent Thomas Gerardi's intention that Jay and Christina McGlone should own the house. Furthermore, they maintain that this dispute belongs in Surrogate's Court where Thomas Gerardi Jr. was granted Letters of Administration of Thomas Gerardi's estate. In their Answer, defendants Jay and Christina McGlone and Robert Gerardi advance defenses sounding in unclean hands, equitable estoppel and unjust enrichment.

Robert Gerardi's jurisdictional objection to service has been waived (CPLR 3211(e); Jacobowitz v Leak, 19 AD3d 453 (2nd Dept. 2005)).

Plaintiff's mislabeling of the property's address at times in his moving papers and misspelling of Angela Basso's name can be overlooked as obvious defects which have been corrected (CPLR 2001).

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Defendants are denied leave to amend their complaint. The only defense sought to be added, i.e., plaintiff's lack of standing, lacks merit (see, *infra*).

Defendants' objection to this action pursuant to CPLR 3211(a)(4) is rejected. The Surrogate's Court proceeding has been concluded.

This Court has jurisdiction of this dispute and plaintiff has standing to maintain it. Upon Thomas Gerardi's intestate death on July 19, 2005, his interest in the property passed immediately to his distributees as tenants in common (EPTL § 4-1.1(a)(1); Matter of Brannen, 14 Misc3d 1226(A), p. 2 (Surrogate's Court Dutchess Co. 2007), citing Matter of Jemzura, 65 AD2d 656, 657 (3rd Dept. 1978), *aff'd.* 52 NY2d 1067 (1981)). Having an interest in the subject property, plaintiff Thomas Gerardi, Jr. has standing to bring this action seeking partition (RPAPL 901; Cheslaw v Huttner, 13 Misc3d 1224(A) (Supreme Court N.Y. Co. 2006) citing Piccirillo v Friedman, 244 AD2d 469 (2nd Dept. 1997)).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (Sheppard-Mobley v King, *supra*, at p. 74; Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., *supra*, at p. 324).

"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, Gabay v Bender, 24 AD3d 133 (1st Dept. 2005); Bufogle v Greek, 152 AD2d 527 (2nd Dept. 1989)). However, "[t]he right to maintain an action for a partition is not absolute and is subject to the equities between the parties." (Kopsidas v Krokos, 294 AD2d 406, 407 (2nd Dept. 2002) citing Stressler v Stressler, 193 AD2d 728 (2nd Dept. 1993); Ripp v Ripp, 38 AD2d 65 (2nd Dept. 1971), *aff'd.* 32 NY2d 755 (1973)). Despite this, unclean hands and estoppel are not generally defenses to a partition action (Grossman v Baker, 182 AD2d 1119 (4th Dept. 1992)). As a defense to the equitable remedy of partition, unclean hands only "applies when the complaining party shows that the offending party is guilty of immoral unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (quotations omitted)." (Kopsidas v Krokos, *supra* citing National Distillers & Chem. Corp. v Seyopp Corp., 17 NY2d 12, 15-16 (1966); see also, Nicolaides v Nicolaides, 173 AD2d 448 (2nd Dept. 1991)).

The defenses of unclean hands, equitable estoppel and unjust enrichment fail.

Standing alone, the opponents' assertions that it was Thomas Gerardi's intention that Jay and Christina would own the property fails (CPLR 4519; Dalmacy v Joseph, 297 AD2d 329 (2nd Dept. 2002); Goldberg v Goldberg, supra).

Jay McGlone and decedent Thomas Gerardi owned the property as tenants in common. Decedent Thomas Gerardi died intestate and decedent's heirs accordingly inherited his interest in the property. Plaintiff has established not only who owns the property, but that ownership in this fashion is no longer feasible. Plaintiff has also established that partition is not a viable option. In response, defendants have failed to raise an issue of fact. Thus, a judicial sale is warranted.

Moreover, as plaintiff has provided a recent title report, the need for the reference to inquire as to creditors may be dispensed with (10-103 Warren's Weed New York Real Property §103.178) except that the referee shall cause the title report to be updated.

Nevertheless, "[a] partition action, although statutory (see RPAPL Art. 9), is equitable in nature and an accounting of the income and expenses of the property sought to be partitioned is a necessary incident thereof." (24 NY Jur2d, Cotenancy and Partition § 24; see also, Cytron v. Malinowitz, 2006 NY Slip Op 51899U, 831 NYS2d 347, Supreme Court Kings Co. 2006)). Therefore, an accounting "may be had as a matter of right before entry of an interlocutory or final judgment to ensure that the parties' rights are fixed in such manner that a decree may work full and complete justice between [them](quotations omitted)." (Cytron v Malinowitz, supra, at p. 8, quoting Grossman v Baker, supra, quoting Grody v Silverman, 222 App.Div. 526, 530 [1928]; accord, Laney v Siewert, 26 AD3d 194, 195 [2006]).

Plaintiff's request for sanctions is denied. Not only were they improperly sought (CPLR 2214), defendants and their attorney's conduct does not warrant their imposition.

Settle order on notice in accordance herewith for the appointment of a referee to ascertain and report on the rights, shares and interests of the parties in the premises including an accounting in conjunction therewith and to report thereon. If the parties are unable to agree on the period of the accounting, the referee shall hear and report on this issue as well.

Said order shall also provide blank spaces for the insertion of the referee's name, address, telephone number and fiduciary identification number. In addition, the order shall provide for payment of fees of the referee on a quantum meritis basis supported by an affirmation of services by the referee, which should be submitted with the application to confirm the report of the referee and for interlocutory judgment of sale.

ENTERED

OCT 10 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE
THOMAS P. PHELAN

10-03-07
Date

J.S.C.

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