

Simons v Koslowski

2008 NY Slip Op 30829(U)

March 18, 2008

Supreme Court, Nassau County

Docket Number: 8247-07/

Judge: Kenneth A. Davis

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

KENNETH SIMONS,

Plaintiff,

SUBMISSION DATE: 2/27/08
INDEX No.: 8247/07

-against-

CHRISTINA KOSLOWSKI,

MOTION SEQUENCE # 1,2

Defendants.

The following papers read on this motion:

- Notice of Motion/Cross-Motion..... XX
- Answering Papers.....
- Reply..... X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Upon the foregoing papers, plaintiff's motion for an order partitioning the residence known as 58E Bedell Street, Freeport, New York (the premises), awarding interim exclusive use and occupancy of the premises, and excluding from the residence the boyfriend of the defendant, a person known as "Peter K;" and defendant's cross-motion for an order directing the plaintiff to pay all carrying charges for the premises including but not limited to principal and interest on mortgages, real estate taxes, homeowners insurance and repairs in the event this Court grants the plaintiff's application for exclusive occupancy of the premises; and granting the defendant interim exclusive occupancy of the

premises are determined as hereinafter set forth.

Plaintiff and defendant are not married. They purchased the premises on September 30, 2002, taking title as joint tenants with rights of survivorship. The purchase price was \$262,500.00 when the parties acquired title to the premises. A mortgage in the sum of \$236,000.00 was taken out in only the name of the defendant. The parties refinanced in 2004. The refinanced mortgage on the premises in the sum of \$280,000.00 was taken out in the name of both plaintiff and defendant.

The defendant entered into a Stipulation of Settlement (Exhibit 3 of plaintiff's Reply Affidavit) with South Nassau Communities Hospital describing an obligation of hers with the hospital in the sum of \$225,354.81. She agreed to pay \$500.00 on October 26, 2005, and then \$350.00 on the 26th day of each month. The aforesaid obligation is secured by a judgment. The Stipulation of Settlement also provides that:

"In the event defendant sells, transfers, mortgages, refinances or in any manner acquires an interest in real property the remaining balance then due and owing under the term stipulation shall then become due at the option of plaintiff."

Since February 1, 2007, the parties have been in default of the mortgage. On or about May 17, 2007, the bank commenced a mortgage foreclosure proceeding. The parties have been unable to reach a buy-out agreement among themselves. An Order Appointing Referee to Compute was entered on August 17, 2007 in the Nassau

County Clerk's Office. A Judgment of Foreclosure and Sale was entered in the Nassau County Clerk's office on December 27, 2007. As of September 17, 2007, the date of the Referee's report, there is approximately \$263,000 due the mortgagee. In light of the defendant's outstanding judgment with South Nassau Communities Hospital the Court must give credence to plaintiff's assertion that the defendant has no incentive to avoid the costly consequences of a partition action which in the end benefits neither side's pecuniary interest. Neither the plaintiff, nor any other parties having an interest in the premises not burdened by the South Nassau judgment should be affected by the outstanding claims of the hospital against the defendant.

Since the parties cannot agree on the sale of the property the right to a partition is absolute. RPAPL 901(1) provides as follows:

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.

Real Property Actions and Proceedings Law § 961-Disposition of proceeds of sale, provides as follows:

The proceeds of a sale, after deducting the costs and expenses chargeable against them shall be immediately awarded as directed by the final judgment, to the parties whose rights and interests have been sold, in proportion thereto. The sum chargeable upon any share to satisfy a lien thereon shall be paid to the creditor, or retained, subject to the order of the court; and the remainder except as otherwise prescribed in this

[* 4]

article, shall be paid by the officer making the sale, to the party owning the share or his legal representatives or into court for his use. The proceedings to ascertain and settle the liens upon an undivided share shall not affect any other party to the action or delay the paying over or investing of money to or for the benefit of any other party upon whose share or interest in the property there does not appear to be any existing lien.

In a partition action the interests of the various parties may be determined by a referee appointed by the Court. The referee's findings may then be confirmed by an order of this court. The plaintiff has not requested the appointment of a referee in the within motion.

The defendant vacated the premises on or about December 9, 2006. The plaintiff changed the locks. The plaintiff alleges the defendant wants to move back into the premises with her new boyfriend, a situation the plaintiff views as untenable. Further, plaintiff alleges the defendant destroyed his personal property kept on the premises and used in the business he conducts out of his house. Defendant claimed she moved out of the premises because she feared for her safety as a result of the abuse by plaintiff. There are sharply conflicting questions of fact surrounding the circumstances of the defendant's departure from the jointly-owned premises.

The motion for partition is granted. A partition action, although statutory, is equitable in nature and the Court may compel the parties to do equity between themselves when adjusting the

proceeds of the sale. *Cook v Petito*, 208 AD2d 886. Subsequent to the completion of discovery and the certification of this matter a referee to proceed with the partition may be appointed by the Court. No later than 10 days after service of a copy of this Order with Notice of Entry, the respective attorneys for the parties shall select a licensed real estate broker to appraise the premises. The real estate broker selected shall prepare an appraisal of the premises within 45 days of today's date and forward a copy to the Court and to each attorney.

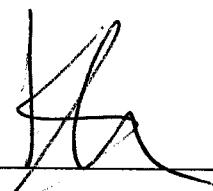
The plaintiff is given interim exclusive use and occupancy of the premises until further order of the Court. The application by the defendant for an order directing the plaintiff to pay all carrying charges for the premises located at 58 East Bedell Street, Freeport, New York 11520, including but not limited to principal and interest on mortgages, real estate taxes, homeowners insurance and repairs while the plaintiff has interim exclusive occupancy of the premises is referred to the trial court. In the event defendant demonstrates that she was wrongfully excluded from the premises when the plaintiff changed the locks, same may be a complete defense at law to plaintiff's demand for reimbursement should he make payments for the mortgage and property taxes during the period of his sole physical occupancy. *Johnson v Martin*, 183 AD2d 1019; *H & Y Realty Company v Baron*, 160 AD2d 412. In determining the equitable division of the proceeds from the sale of the premises the Court may consider the nature of the parties' relationship,

disparities in the down payments and mortgage payments and the reasonable value of the rental payments with regard to an ousted co-tenant. See *Zapp v Miller*, 109 NY 51; *Laney v Siewert*, 26 AD3d 194.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located in the basement of the Nassau County Supreme Court on the 27th day of March, 2008, at 9:00 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the defendant shall serve a copy of this order on the Preliminary Conference Clerk, and the attorneys for the plaintiff, South Nassau Communities Hospital and Chase Home Finance LLC.

In the event this matter is settled, counsel shall forward a copy of same to Chambers.

Dated: MAR 18 2008



Kenneth A. Davis, J.S.C.

ENTERED

MAR 20 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE