

Donlon v Diamico

2008 NY Slip Op 33066(U)

November 6, 2008

Supreme Court, Queens County

Docket Number: 6152/03

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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BARBARA DONLON a/k/a BARBARA T.
DONLON,

Index No: 6152/03
Motion Date: 11/5/08
Motion Cal. No: 7
Motion Seq. No: 3

Plaintiff,

-against-

GLORIA DIAMICO a/k/a GLORIA D'AMICO,
MARY FERN BREHENEY, as Guardian of the
Property of RUDOLPH TSCHERNE a/k/a
RUDOLPH TSCHERNE, JR.,

Defendants.

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The following papers numbered 1 to 74 read on this motion by defendant Gloria D'Amico for an order entitling her to reimbursement for the payment of taxes, homeowners insurance, upkeep and maintenance, and expenditures for permanent improvement; and dismissing any claims by any representative of the pre-deceased brother, Rudolph Tscherne a/k/a Rudolph Tscherne Jr., upon the grounds that no claims of debts were ever filed on behalf of the brother, Rudolph Tscherne, during his lifetime, neither by personal representative nor anyone else, and that upon his death any share of the brother Rudolph Tscherne, was immediately transferred to his two surviving sisters, plaintiff Barbara Donlon and defendant Gloria D'Amico as tenants-in-common, without any encumbrances; and upon this cross-motion by plaintiff Barbara Donlon for an order compelling defendant D'Amico to sign a contract of sale for the sale of the real property known as 135-25 96th Street, Ozone Park, New York, and all associated documents including deed, deed transfer and tax documents and to cooperate with the Court-Appointed attorney to handle the sale of the subject premises, Dustin J. Dente, Esq; or in the alternative, appointing plaintiff limited attorney-in fact for defendant D'Amico as it relates to the execution of usual and customary documents for the sale and transfer of the subject premises; and scheduling a hearing to determine the parties claims relating to the imputed value of the use and occupancy, rental income, expenses of the subject premises and appropriate apportionment of the same between the parties.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... 1 - 4

Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 10
Affirmations in Opposition-Exhibits.....	11 - 22
Reply Affirmations-Exhibits.....	23 - 29
Supplemental Reply Affirmation-Affidavit-Exhibits.....	30 - 35
Transcript of February 7, 2008 Conference.....	36
Accounting by Gloria D’ Amico.....	37 - 41
Plaintiff’s Affirmation In Response to the Accounting.....	36 - 45
Affidavit of Gloria D’ Amico.....	46 - 52
Plaintiff’s Affirmation In Response to the Accounting.....	53 - 55
Letters from the Parties to the Court.....	56 - 71
October 8, 2008 Stipulation-April 9, 2008 Discontinuance.....	72 - 73
Stipulation-Stipulation of Discontinuance.....	74

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

Relevant Facts

This is an action commenced by plaintiff Barbara Donlon a/k/a Barbara T. Donlon (“plaintiff”), for the partition and sale of real property known as 135-25 96th Street, Ozone Park, New York, and an accounting arising from the use and occupancy of the property by her sister, defendant Gloria Diamico a/k/a Gloria D’ Amico (“defendant”). Plaintiff, defendant and decedent Rudolph Tscherne a/k/a Rudolph Tscherne, Jr. (“Tscherne”), who had Down’s Syndrome, was profoundly mentally retarded, and resided in a state facility for more than 40 years until his death on June 3, 2005, were the sole heirs of Sophie Tscherne, their mother, who died intestate on March 26, 1995, leaving as her only asset the subject premises. Shortly after their mother’s death, plaintiff and defendant petitioned the Surrogate’s Court, Nassau County for Letters of Guardianship for Tscherne, and by Decree dated March 4, 1996, the Surrogate issued Letters to plaintiff and appointed defendant as Standby Guardian. The Decree and Letters restrained plaintiff and defendant from collecting or disposing of any of Tscherne’s property without further order of the court. On March 18, 1996, plaintiff, in her individual capacity and as the guardian for Tscherne, and defendant, executed a deed as the heirs of their mother’s estate, conveying the premises in 1/3 shares as tenants in common to themselves and Tscherne, who was adjudged an incapacitated person incapable of managing himself or his affairs by reason of mental retardation, and Mary Fern Breheney, Esq., was appointed the guardian of his property, by amended order and judgment of the Supreme Court, Orange County, dated July 24, 2002, the (DeRosa, J.).

Procedural History

Plaintiff commenced this action seeking partition and sale of the premises, and an accounting of the parties’ respective interests in the property, including rental income and expenditures for the payment of taxes, insurance, improvements and related disbursements, to be paid out of the monies generated by the sale. By order of this Court dated May 4, 2004, the motion by plaintiff for partial

summary judgment, inter alia, directing the partition, sale and accounting of the subject premises was granted, and the cross-motion by defendant for summary judgment dismissing the complaint and for an order vacating a aforementioned deed was denied. In making its determination, this Court stated, in pertinent part, the following:

A tenant in common has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he/she does not interfere with the right of the other tenant to also occupy the premises (see, *Corsa v Biernacki*, 2 AD3d 388). The occupancy by one of the tenants in common, in and of itself, does not make that tenant liable to the other tenant for use and occupancy (see, *Corsa v Biernacki*, *supra*).

Here, it appears that the property is a single family home which cannot be partitioned (see, *Ferguson v McLoughlin*, *supra*). [Plaintiff] chooses not to occupy the premises, and Tscherne cannot occupy the premises. It further appears that from the date of the deed conveying their 1/3 interests, neither [plaintiff] nor Tscherne ever contributed their 1/3 share of the maintenance, upkeep or repair of the premises, including taxes and insurance and, instead, [defendant] has entirely borne these costs.

[]As a result, [plaintiff] is entitled to partial summary judgment on her complaint seeking a partition and judicial sale of the premises and an accounting, and the affirmative defenses interposed by [defendant] are dismissed. [Defendant's] discovery requests are stricken. [Plaintiff] is granted leave to amend the complaint to add the allegation relating to her request for an accounting.

Claims by [defendant and plaintiff] for rent, use and occupancy, improvements, repairs, taxes and other related items shall be determined in an accounting proceeding so they may be factored into the distribution of the net proceeds of the sale of the property prior to the entry of any final judgment (see, *Grossman v Baker*, 182 AD2d 1119; see also, *Corsa v Biernacki*, *supra*; *Frater v Lavine*, 229 AD2d 564).

By order of the Appellate Division, Second Department, dated October 24, 2006, this Court's order was "modified, on the facts and as a matter of discretion, by adding a decretal paragraph thereto directing that an accounting be made prior to the entry of an interlocutory judgment directing the sale of the subject premises," and to the extent modified, the order was affirmed. Thereafter, plaintiff's motion was submitted for decision on October 10, 2007, which plaintiff asked to be expedited by letter dated October 29, 2007, based upon the fact the homeowners' insurance of the property had

lapsed. As a result of this development, this Court scheduled a conference on November 2, 2008, and exhausted several hours attempting to fashion a resolution to many of the issues presented. The parties drafted a stipulation whereby, inter alia, the property was to be sold by a court-appointed real estate attorney, and Dustin J. Dente, Esq., was subsequently appointed by this Court, sua sponte, to serve in that capacity on December 7, 2007.¹ Thereafter, upon numerous subsequent conferences and a plethora of interactions with this Court in the spirit of settlement, the motion and cross-motion were held in abeyance, but finally submitted on April 9, 2008 when settlement negotiations were forestalled.

By letter dated April 15, 2008, the parties submitted a stipulation dated April 9, 2008 to be so-ordered by this Court seeking leave to amend the caption to reflect the appointment of Mary Fern Breheny, Esq., the guardian of the property of Tscherne, as Administratrix of the estate of Tscherne, who died in June 2005. Thereafter, the motion and cross-motion were again held in abeyance as plaintiff's counsel indicated that the subject property was in contract to be purchased by a third-party, and requested a conference to identify the remaining issues, which was held on the record before this Court on September 25, 2008. At that conference, which appeared counsel for the parties, Mark Brody, Esq., on behalf of the Attorney General's Office, and Attorney Dente, the parties entered into a tentative agreement resulting in a global settlement of the action, and the matter was adjourned to October 8, 2008. Thereafter, pursuant to stipulation and a stipulation of discontinuance, both signed by the parties on that day, and the ensuing conference held on the record at the return date of the papers, the matter was settled, and the motion and cross-motion were adjourned to October 29, 2008, pursuant to the aforementioned stipulation.²

¹ Due to the acrimony that had developed between counsel for Donlon and D'Amico, Mary Fern Breheny, Esq., the appointed guardian for Tscherne, was selected by counsel for Donlon and D'Amico to recommend three local real estate attorneys to this Court, as it was stated that she was the most impartial due to the fact that she practices in Newburgh, New York. As a result, by letter dated November 12, 2007, Attorney Breheny proffered such names and this Court advised the parties to insert Attorney Dente's firm into the aforementioned stipulation to be so-ordered by the Court. Notwithstanding, the stipulation was never proffered as counsel for D'Amico refused to sign the stipulation based upon objectionable provisions. As a consequence, this Court gave an oral directive as of December 7, 2007 to appoint Attorney Dente's firm to sell subject property.

² By letter dated October 29, 2008, Mr. Kessler, counsel for plaintiff, advised that the closing scheduled for that evening was in jeopardy as Mr. Brady, counsel for defendant D'Amico, stated that defendant would not attend the closing as the sales proceeds had not cleared as of that day. As a result, this Court directed that Mr. Brady and all parties attend the closing, however, despite such appearance, the closing did not go forward for various reasons. Thereafter, pursuant to conference call on October 30, 2008, the parties agreed to appear for the closing on October 31, 2008, and despite conflicts, Attorney Dente rearranged his schedule to conduct the closing. The parties agreed to make the motion and cross-motion returnable on

Conclusion

Accordingly, the motion by defendant Gloria D'Amico for an order entitling her to reimbursement for the payment of taxes, homeowners insurance, upkeep and maintenance, and expenditures for permanent improvement; and dismissing any claims by any representative of the pre-deceased brother, Rudolph Tscherne a/k/a Rudolph Tscherne Jr., upon the grounds that no claims of debts were ever filed on behalf of the brother, Rudolph Tscherne, during his lifetime, neither by personal representative nor anyone else, and that upon his death any share of the brother Rudolph Tscherne, was immediately transferred to his two surviving sisters, plaintiff Barbara Donlon and defendant Gloria D'Amico as tenants-in-common, without any encumbrances; and the cross-motion by plaintiff Barbara Donlon for an order compelling defendant D'Amico to sign a contract of sale for the sale of the real property known as 135-25 96th Street, Ozone Park, New York, and all associated documents including deed, deed transfer and tax documents and to cooperate with the Court-Appointed attorney to handle the sale of the subject premises, Dustin J. Dente, Esq; or in the alternative, appointing plaintiff limited attorney-in fact for defendant D'Amico as it relates to the execution of usual and customary documents for the sale and transfer of the subject premises; and scheduling a hearing to determine the parties claims relating to the imputed value of the use and occupancy, rental income, expenses of the subject premises and appropriate apportionment of the same between the parties, are resolved pursuant to stipulations of the parties dated April 9 and October 8, 2008, and it is

ORDERED, that pursuant to stipulation of the parties dated April 9, 2008, the caption of this action hereby is amended to read as follows:

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 BARBARA DONLON a/k/a BARBARA T.
 DONLON,

Index No: 6152/03

Plaintiff,

-against-

GLORIA DIAMICO a/k/a GLORIA D'AMICO,
 MARY FERN BREHENY, as Administratrix of
 the Estate of RUDOLPH TSCHERNE a/k/a
 RUDOLPH TSCHERNE, JR.,

Defendants.

-----X

November 5, 2008, to ensure that all issues were resolved at the closing, which this Court was

(... continued)

advised by Attorney Dente on October 31, 2008 and counsel for Donlon on November 5, 2008, that the closing was successful and the matter is settled. Counsel for Donlon by appearance and by letter to this Court on November 5, 2008, the final return date of the motion and cross-motion, advised that the only remaining issue is the amending of the caption so that a stipulation of discontinuance could be filed.

and it is further

ORDERED, that the underlying pleadings hereby are deemed amended nunc pro tunc to reflect the appropriate caption, and all references to, and representations formerly made shall be stricken from the record; and it is further

ORDERED, that the stipulation dated October 8, 2008, is likewise deemed amended nunc pro tunc to reflect the appropriate caption, and may be filed with the Clerk of the Court in its present form upon the contemporaneous serving of a copy of this order with such filing; and it is further

ORDERED, that the stipulation of discontinuance also dated October 8, 2008, is deemed amended nunc pro tunc to reflect the appropriate caption, and may be filed with the Clerk of the Court in its present form upon the contemporaneous serving of a copy of this order with such filing; and it is further

ORDERED, that pursuant to the stipulation dated October 8, 2008, the action hereby is settled, and the parties are directed to fully comply with the terms and conditions of the aforementioned stipulation; and it is further

ORDERED, that the instant action hereby is discontinued, as set forth in the stipulation of discontinuance dated October 8, 2008 annexed to the moving papers.

Dated: November 6, 2008

.....
J.S.C.