

**Lebor v Lebor**

2009 NY Slip Op 32321(U)

October 2, 2009

Supreme Court, Nassau County

Docket Number: 21817/2008

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

SCAN

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ANNETTE LEBOR,

Plaintiff,

Michele M. Woodard, J.S.C.  
IAS Part 14  
Index No.:21817/2008  
Motion Seq. No. 01  
MEMORANDUM DECISION

-against-

AVRAM LEBOR, HIGH BRANCH SOFTWARE, INC.,  
HARBOR BAY ISLE ASSOCIATES, JOHN W. LANG, AN  
INDIVIDUAL ASSIGNEE OF TERRITORIAL COALITION,  
INC., A MINNESOTA CORPORATION, N.A.,  
ADVERLIGHT COLLECTIONS, INC., NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE,  
INTERNAL REVENUE SERVICE, RACHEL Rozmaryn,

Defendants,

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**Papers Read on this Motion:**

Plaintiff's Notice of Motion	01
Defendant's Opposition	xx
Plaintiff's Reply	xx

The Plaintiff moves for summary judgment pursuant to CPLR §3212(a),(e) and seeks dismissal of Harbor Bay Isle Associates Answer and Counterclaim, and Rachel Rozmaryn's answer. Harbor Bay Isle Associates, hereinafter referred to as Harbor Bay, opposes the motion. Defendants Harbor Bay and Rozmaryn are the only Defendants that have Answered.. NYS and USA have appeared by service of Notice of Appearance and Waivers. April 24, 2009 - USA and Plaintiff entered into a stipulation where the USA consented to be added as a named Defendant All other defendants have not Appeared or Answered and their time to do so has expired.

This matter is before the Court as a result of the Plaintiff seeking a partition of her former marital property, known as 58 Sealy Drive, Lawrence, NY. The Plaintiff seeks a partition action and distribution of the proceeds subject to the mortgage lien and amount due to all other parties in this action. The judgments are only to be held against the Defendant Lebor's interest in the property because the judgments were only entered against Defendant Lebor.

If the Court does not dismiss Harbor Bay's claims and defenses, the Plaintiff seeks to have partial summary judgment and severance of Harbor Bay's remaining claims and defenses arguing that none of Harbor Bay's claims and defenses are a defense to the Plaintiff's right to partition.

Plaintiff and Defendant purchased subject property on March 2, 1977 for \$90,000.00 as

tenants in common. The Plaintiff has lived in the home since its purchase. According to the Plaintiff in December 2, 2002, the Plaintiff and Defendant were struggling to make payments on the mortgage dated May 23, 1985 in the amount of \$230,000.00. So, Rozmaryn took an assignment of the mortgage dated April 10, 2003 recorded with the Nassau County Clerk in Liber 23957 Page 298 on April 15, 2003. Rozmaryn paid PNC Bank, N.A. \$43,184.53 in order for the Plaintiff and Defendant to retain their home. Rozmaryn has never been evicted contrary to Harbor Bay's claims.

In August 2000 , Defendant Lebor entered into a contract with Harbor Bay to obtain a mortgage for Harbor Bay with respect to property in California. Harbor Bay sent the Defendant \$273,500.00. The Defendant took the money but never effectuate the deal. Northern District of California entered judgment in Harbor Bay's favor in the amount of \$875,438.30.

On or about April 10, 2003, before the Defendant went into prison and when he still had the benefit of Harbor Bays funds, Rozmaryn paid PNC Bank \$43,184.53 and was assigned the mortgage. Harbor Bay has not submitted any proof that a transfer occurred between Avram Lebor and Rachel Rozmaryn.

In August 2004, the Defendant was incarcerated for defrauding Harbor Bay. Several additional judgements have been entered against the Defendant including High Branch Software, Inc. - \$80,185.00, Harbor Bay - \$875, 438.30, John W. Lang - \$71,298.26, Citibank - \$6,311.07 Adverlight Collections - \$11,807.52, USA - \$8,481,606.06, IRS - \$64,75967, NYS Tax - \$12,622.78 and \$6,254.74

In June 2008 the Plaintiff filed for divorce. A Judgment of Divorce was entered on October 23, 2008. (Index No. 210506/2008). As a result, the Plaintiff and Defendant became tenants in common instead of tenants by the entirety.

Harbor Bay claims that the Defendant Lebor transferred money to Rozmaryn to acquire the mortgage without consideration. The Plaintiff denies Rozmaryn ever received money from her or her husband in exchange for the assignment. The Plaintiff claims that she cannot continue to pay the carrying charges on the home. Harbor Bay claims that Plaintiff is barred by unclean hands doctrine and that she failed to mitigate damages. Harbor Bay further argues that partition is barred by fraud, and doctrine of unconscionability. Harbor Bay argues that it did not cause Plaintiff's damages, but an intervening and/or supervening cause did, partition is barred by doctrine of waiver and estoppel.

According to the Plaintiff, Defendant Avram Lebor's actions caused extensive liens and judgments against the martial home. Plaintiff and Defendant cannot agree on a sale; therefore, partition is needed to salvage any equity in the home. Under the Plaintiff's plan, Defendant's creditors will be paid from Defendant's share of the proceeds. Plaintiff's creditors will be paid from her share. The mortgage held by Rozmaryn, the Plaintiff's mother, will be paid by both shares. Harbor Bay's assertions have nothing to do with anything mentioned above. Nothing to dispute regarding Rozmaryn because she will be paid according to the law.

Harbor Bay's claim has no relationship to the cause of action in the within matters Complaint. Other parties who are entitled to monies arising out of this sale is an issue for the referee and is not a defense to partition.

The Plaintiff and Rozmaryn did not receive and fraudulent funds from the Defendant regarding the property or mortgage. Rozmaryn acquired the mortgage on December 12, 2002, two years prior to Harbor Bay's entry of judgment against the Defendant for \$43,184.53.

The alleged conduct of the Plaintiff is not directly related to the subject matter in this litigation and Harbor Bay has not been injured as a result. Unclean hands claim relates to the acquisition of the mortgage and not the property/partition.

As far as a constructive trust is concerned, the Plaintiff not in confidentiality or fiduciary relationship with Harbor Bay, no unfulfilled promise to convey an interest in land to Harbor Bay exist and there was no transfer to the Plaintiff resulting in unjust enrichment.

Harbor Bay does not indicate what assets the Plaintiff exercised control over that Harbor Bay was entitled to. Since Harbor Bay does not claim it has a right to the property, there is no conversion claim. The Judgment against the Defendant does not give Harbor Bay any superior or possessory rights over any property.

Harbor Bay argues that the mortgage assignment to Rachel Rozmaryn was a vehicle to launder the Defendant's ill gotten funds. Harbor Bay is not looking to prevent the partition, but looking ahead when accounting will be conducted in order for Harbor Bay to receive their share. Harbor Bay needs discovery before an accounting can take place. It must be proven that the money used by Rozmaryn did not come from the Defendant.

In the matter of *Juseinoski v NY Hosp. Med. Ctr.*, 29 AD3d 636 the Court ruled that summary judgment is premature when the facts essential to justify opposition to the motion are exclusively within the knowledge of the moving party and the opposing party has not had a reasonable opportunity for disclosure prior to the motion. Here the facts are only known to the Plaintiff, Defendant, and Rozmaryn and Harbor Bay must be given the opportunity to review the documents and depose parties. CPLR §3212(f).

Harbor Bay does not dispute the Plaintiff's entitlement to the relief sought of a partition. Harbor Bay claims that discovery is necessary concerning issues not before this court but regarding issues that would go before a referee. Therefore, Harbor Bay's claim under CPLR §3212(f) is deficient. Harbor Bay has not presented any evidence of Defendant Lebor transferring money to Rozmaryn.

Harbor Bay cannot produce sufficient evidence to establish the existence of material fact which warrants a denial of summary judgment. Harbor Bay's claim regarding distribution of the sale proceeds has not bearing on this motion. *Goldberg v Goldberg*, 173 Ad2d 679.

Partition is equitable and the Court can compel the parties to do equity between themselves and not third parties when adjusting the distribution of the sale of the proceeds. *Corsa v Biernacki*, 2 AD3d 388; *Deitz v Deitz*, 245 AD2d 638 . Following the referee's report and sale, the Court can adjust the rights of the parties so each receives his or her proper share of the profits. *Tedesco v Tedesco*, 269 AD2d 660.

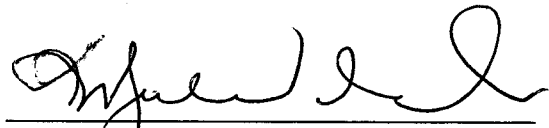
The Defendants allegation of unclean hands is not applicable in this matter. Unclean Hands is only applicable when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct which is directly related to the subject matter in the litigation and the complaining party was injured by such conduct. *Kopsidas v Krokos*, 294 AD2d 406, 407. This does not apply here because the unclean hands is only relevant to the mortgage and not the right to partition.

The Plaintiff's application for Summary Judgement is *granted* and the Counterclaims of Harbor Bay are dismissed.

Settle Judgement.

DATE: October 2, 2009  
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD  
J.S.C.