

Goetz v Slobey

2009 NY Slip Op 33397(U)

June 12, 2009

Supreme Court, Suffolk County

Docket Number: 28675/2004

Judge: Paul J. Baisley

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
LORALEE J. GOETZ, as Executrix of the Estate of
LENORE BRUNDAGE, Deceased,

Plaintiff,

-against-

PAMELA SLOBEY, as Administratrix of the Estate of
VIRGINIA A. SLOBEY, Deceased,

Defendant.
-----X

INDEX NO.: 28675/2004
MOTION DATE: 1/15/2009
MOTION NO.: 004 MD
005 MOT D

PLAINTIFF'S ATTORNEY:
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DEFENDANT'S ATTORNEY:
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New York, New York 10001

WILLIAM F. MACKEY, JR., ESQ.
Referee
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Mineola, New York 11501

Upon the following papers numbered 1 to 42 read on this motion to confirm referee's report and cross-motion to reject referee's report; Notice of Motion/ Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-21; Answering Affidavits and supporting papers 22-36; Replying Affidavits and supporting papers 37-42; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 004) of plaintiff Lorelee J. Goetz as Executrix of the Estate of Lenore Brundage, deceased, for an order pursuant to CPLR R. 4403 confirming the report of the referee, William F. Mackey, Jr., Esq., dated October 31, 2008, and ordering that the property be sold, is denied; and it is further

ORDERED that the cross-motion (motion sequence no. 005) of defendant Pamela Slobey as Administratrix of the Estate of Virginia A. Slobey, deceased, for an order rejecting the report of the referee, dismissing the action to the extent plaintiff seeks to partition the upland residential property, and vesting title to the upland residential property in defendant, granting defendant leave to amend her answer to assert a counterclaim to partition the underwater parcel, providing for the joint and equal payment by plaintiff and defendant of the fees of the referee and the appraiser in a reasonable sum to be fixed by the Court, and discharging the referee from his service with regard to this action, is determined as set forth hereinafter.

The report of William F. Mackey, Jr., Esq., the referee in this partition action, submitted in accordance with the July 5, 2005 and October 1, 2008 orders of this Court (BAISLEY, J.), reflects the following facts:

Plaintiff Leonore Brundage commenced this partition action in 2004 with respect to certain real property in Montauk, New York that she owned jointly with her long-term domestic partner, defendant Virginia Slobey. The subject property comprises two parcels: an upland, improved parcel acquired by the parties in 1953 and held "as joint grantees, with full right of

survivorship,” and an adjoining underwater parcel acquired in 1974 and held as tenants in common. At the time of the commencement of the action, the parties, both elderly and in failing health, were estranged, and plaintiff was living in an assisted living facility in Georgia while defendant Virginia Slobey continued to reside in the parties’ Montauk home.

It appears that after the July 5, 2005 order appointing the referee herein, the parties engaged in settlement discussions which, at the parties’ request, were facilitated and moderated by the referee (whose fees for such services the parties agreed to share equally). These discussions were abruptly terminated when on May 24, 2006, at the age of 94, plaintiff Leonore Brundage died, thus effecting an “automatic stay” of these proceedings. On August 23, 2006, the referee submitted an “interim status letter” to the Court, in which he opined that upon the death of the plaintiff, the defendant, as surviving joint tenant, acquired “title in fee simple absolute” to the improved, upland parcel, and that the plaintiff’s undivided one-half interest in the underwater parcel passed to her estate as tenant in common with the defendant Virginia Slobey.

On November 24, 2006, defendant Virginia Slobey died. Thereafter, by short form order (BAISLEY, J.) dated July 15, 2008, the personal representatives of each party’s estate were substituted in the action. The October 1, 2008 order of the Court directed the referee to “decide and report to the Court whether the property can be physically divided or must be sold, and the ramifications and legal status of the joint tenancy and tenancy in common, and to sell the property at judicial auction if so ordered.”

In his report dated October 31, 2008, submitted in accordance with the foregoing order, the referee repudiated his previous opinion as premature, and concluded that:

“[T]he joint tenancy with right of survivorship that was created by the deed executed on September 1, 1953 was legally severed or terminated prior to the death of the co-tenant, Lenore Brundage. As a result, the co-tenants...became tenants in common. There is no survivorship right to enforce in this action. The parcel located at 50 West Lake Drive in Montauk, New York, as well as the abutting underwater parcel, are now both held as a tenancy in common, albeit by the present successors in interest.”

The referee further found that “the subject property is so situated that it cannot be actually or physically partitioned or divided without completely destroying its character and value. As a result, the property must be sold in the open market and the net proceeds of the sale must be equitably divided between the parties herein.” The referee took no position regarding the parties’ respective equitable shares, no evidence regarding that matter having been adduced. The plaintiff and defendant now move, respectively, to confirm and to reject the referee’s report.

Upon a careful review of the parties’ submissions, the facts, the applicable law, and the thorough and comprehensive report of the learned referee, the Court is constrained to respectfully disagree with the conclusion of the referee that the joint tenancy was severed prior to plaintiff’s death “by a combination of acts and events.” The Court agrees with the referee’s conclusion that

the act of the plaintiff in commencing the partition action in and of itself was insufficient to sever the joint tenancy (*Ellison v Murphy*, 128 Misc 471 [Sup Ct 1927]). The Court further agrees with the referee's conclusion that the "doctrine of merger" is not applicable to this case. The Court does not, however, agree that the defendant's asserted failure to deny or controvert plaintiff's factual allegations¹ or to substantively oppose plaintiff's motion for the appointment of a referee is the equivalent of the "implied consent to partition" found by the Court in *O'Brien v O'Brien* (89 Misc. 2d 433 [1976]). Nor does defendant's willingness to engage in settlement discussions, including the possibility of a buy-out of plaintiff's interest, indicate an intent to abandon her survivorship rights prior to a settlement being effectuated or a final judgment being entered in the partition action. In fact, the May 12, 2006 letter from defendant's attorney to the referee (annexed to defendant's cross-motion as Exhibit J) noted defendant's offer to, as part of a negotiated settlement, "convert the subject property into a tenancy in common, *subject to* Ms. Brundage's agreement that Ms. Slobey may remain in the house...." It is apparent therefrom that defendant did not consider her rights of survivorship to be terminated as of that date, a mere two weeks before the plaintiff's death, and it is undisputed that no such settlement agreement was ever entered into.

As to the referee's finding of statutory grounds to conclude that the joint tenancy had been severed prior to plaintiff's death, the Court does not agree that the July 5, 2005 order of this Court "effectively ended the joint tenancy," or that the order effected the "severance" contemplated by Real Property Law §240-c(3)(c). In addition, the mere filing by plaintiff of the summons and complaint does not constitute a "written instrument that evidences the intent" of plaintiff "to sever the joint tenancy" that satisfies the filing requirement of RPL §240-c(1)(b).

In short, the Court finds insufficient evidence in the record to support deviating from the well recognized and generally accepted rule that "death of a joint tenant while a partition action is pending eliminates the deceased's interest, and title vests in the survivor" (*O'Brien, supra*, 89 Misc. 2d at 434, citing *Ellison, supra*, 128 Misc 471). Accordingly, plaintiff's motion to confirm the referee's report is denied, and defendant's cross-motion to reject the report is granted to the extent that the referee's finding that the joint tenancy was severed prior to plaintiff's death is rejected. Instead, the Court accepts and adopts the finding of the referee in his "interim status report" to the Court that upon the death of plaintiff Lenore Brundage, defendant Virginia Slobey, as surviving joint tenant, acquired "title in fee simple absolute" to the improved, upland parcel, and that the plaintiff's undivided one-half interest in the underwater parcel passed to her estate as tenant in common with the defendant Virginia Slobey. The Court further finds that upon the subsequent death of defendant Virginia Slobey, title to the improved upland parcel passed by operation of law to defendant's distributees, who have previously been identified to the Court as Pamela Slobey, Wayne D. Duncan, and Therese L. Duncan (who, although they appear to be necessary parties, have not been joined in the action). The Court further finds that the foregoing distributees share a one-half interest in the underwater parcel as tenants in common with the estate of plaintiff Lenore Brundage, which holds an undivided one-half interest therein.

In light of the foregoing determination, so much of defendant's cross-motion as seeks to dismiss the action to the extent it seeks to partition the upland, improved parcel is granted, and the

¹ In fact, defendant's answer denied the only substantive paragraph of the complaint, that pertaining to partition, and otherwise demanded "judgment dismissing the complaint."

action as to the underwater parcel is severed and continued. In light of the fact that all of the necessary parties are not presently before the Court, the Court denies defendants' remaining requests for relief, and refers the matter to a status conference to be held before the undersigned on August 4, 2009 at 10 a.m.

Dated: June 12, 2009



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION