

**White v White**

2010 NY Slip Op 32223(U)

August 4, 2010

Supreme Court, Queens County

Docket Number: 29013/08

Judge: Howard G. Lane

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**MEMORANDUM**

SUPREME COURT - QUEENS COUNTY  
IA PART 6

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JOAN WHITE,

Plaintiff,

-against-

ROBERT WHITE,

Defendant.  
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BY: **LANE, J.**

DATED: August 4, 2010

INDEX NO.: 29013/08

MOTION DATE:  
May 11, 2010

MOTION SEQUENCE NO.: 1

MOTION CAL. NO.: 28

Plaintiff, Joan White's motion for an order for summary judgment against defendant, Robert White, and an interlocutory judgment of partition and sale including an order of reference to sell the premises is hereby granted to the following extent:

Pursuant to the Complaint, this is an action seeking partition by judicial sale of certain real property owned by plaintiff and defendant, which property is located at 22-22 94th Street, Flushing, New York. It is alleged by plaintiff that defendant has entered upon and taken possession of the premises to the exclusion and ouster of the plaintiff.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley*

*Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

Plaintiff presents a prima facie case that there are no triable issues of fact. In support of the motion, plaintiff presents the affidavit of Plaintiff herself. Plaintiff established that each owns one-half of the premises as a tenant in common. Plaintiff established that defendant Robert White, ousted and excluded the plaintiff from the premises through acts of domestic violence. Plaintiff avers, inter alia, that the defendant has failed to pay water and sewer charges for years, that during the time in which she was excluded from the premises, defendant kept an apartment vacant and failed to rent it out, that she lived at the premises until late 1970 or early 1971, when she was forced to leave the home due to her brother's actions, that he became domineering and controlling and he frightened her, she was not safe there and could not be safe there even now, "[h]e has taken exclusive control and possession of the house and is committing waste in failing to rent the premises and putting the entire property at risk by not paying the water and sewer charges arising from his personal use and apparently running large penalties for his refusal to allow the City to put in a water meter. Despite his complete control over the premises he has not paid any property taxes, which has also put the property at risk." Plaintiff also includes the examination before trial transcript testimony of defendant himself.

Pursuant to RPAPL 901(1): an action for partition is maintainable by “[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.” (*Duffy v. Duffy*, 21 AD3d 928 [2d Dept 2005] [NY RPAPL 901[1])). Partition is not an absolute right of a tenant in common, as the remedy is subject to the equities of the parties. (*Graffeo v. Paciello*, 46 AD3d 613 [2d Dept 2007]). It is the court’s responsibility to ascertain the respective interests of the parties before partition or sale is directed (RPAPL 915; see, *Grassman v. Baker*, 182 AD2d 1119; *George v. Bridboard*, 113 AD2d 869).

Furthermore, in the absence of an agreement against partition, partition among joint tenants or tenants in common of real property is a matter of right where they do not desire to hold and use the property (*Chew v. Sheldon*, 214 NY 344 [1915]; *Smith v. Smith*, 116 AD2d 810 [3d Dept 1986]; *Gasko v. Del Ventura*, 96 AD2d 896 [1983]). In the instant case, plaintiff established her entitlement to summary judgment by establishing her ownership and right to possession of the subject property. Moreover, there is no relevant evidence submitted to establish an agreement between the parties not to partition the premises.

Plaintiff as an owner of an interest in the property as a tenant in common has an absolute right to its partition and sale (RPAPL 901; *Chew v. Sheldon, supra*). "It cannot be said that the equities favor the defendant's position." (*Graffeo v. Paciello, supra*) (internal citations omitted). Plaintiff established a prima facie right to a sale of the premises because she established that the property was "so circumstanced that a partition thereof cannot be made without great prejudice to the owners," (*Id.*) as she established that the premises is a two-family house on a single lot and is unsuited to a physical partition.

In opposition, defendant fails to raise a triable issue of fact. Defendant fails to dispute that the premises were owned by plaintiff and defendant as tenants in common, each with a one-half interest in the subject property or that partition without great prejudice to defendant.

Thus, plaintiff has a statutory right to partition or partition and sale of the property and defendant has failed to present any defense which would defeat plaintiff's entitlement to a partition.

Accordingly, the motion for partition of the premises located at 22-22 94<sup>th</sup> Street, Flushing, New York, is granted to the extent that a sale shall be ordered upon confirmation of the report of the referee to be appointed in the order to be settled

hereon. Said referee shall ascertain the rights, shares and interest of the parties herein as well as the existence of creditors who may have liens on the premises (see, RPAPL 911, 913).

Settle an order of reference consistent with this memorandum decision.

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**HOWARD G. LANE, J.S.C.**