

Salley v Gaynes

2011 NY Slip Op 31204(U)

May 4, 2011

Supreme Court, Kings County

Docket Number: 2506/85

Judge: Loren Baily-Schiffman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

_____X

THEODORE SALLEY and ALMA SALLEY,

Index No. 2506/85

Plaintiff,

- against -

DECISION AND ORDER

NORMAN GAYNES, CATHERINE GAYNES, ET AL.,

Defendants.

_____X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for an Order of Distribution

Papers	Numbered
Notice of Motion, Affirmation in Support, Exhibits, and Affirmation of Service.....	1
Affirmation in Opposition.....	2
Reply Affirmation in Support and Exhibit.....	3

Upon the foregoing cited papers the Decision/Order on this motion is as follows:

This was motion was commenced by Atlantis Asset Recovery LLC on behalf of Catherine Gaynes, one of the defendants in the foreclosure action that was brought in 1985. Ms. Gaynes is requesting that the Court issue an order directing the Office of the State Comptroller to disburse the remaining one-half (1/2) of the surplus monies to her on the grounds that she is the former co-owner and the heir of defendant Norman Gaynes (deceased) and therefore entitled to the surplus monies pursuant to operation of law. The only opposition presented is from the Office of the State Comptroller. They take the position that a surplus money fund from a foreclosure sale is deemed to be held by a husband and wife as tenants

in common and not as tenants by the entirety, relying on ***First Federal Sav. and Loan Assn. of Rochester v. Brown*, 78 AD2d 119 (4th Dept 1980)**.

Background:

On or about June 12, 1984, Defendants Norman Gaynes and Catherine Gaynes became the owners of record of the subject premises, 883 Herkimer Street, Brooklyn, New York. A foreclosure action was later brought, which resulted in a Judgment of Foreclosure and Sale, and then a public sale. The Referee, Michael Garson, Esq., filed a Report of Sale on November 17, 1987. The Plaintiffs herein were paid in full on the underlying outstanding obligation. Afterwards, the Referee deposited the surplus monies from these proceedings, the sum of \$14,645.34, with the Office of the Clerk of the Kings County.

Norman Gaynes died intestate on December 29, 1990. The name "Mary Lebron" appeared on Mr. Gaynes' Death Certificate as surviving spouse. Despite being named as surviving spouse on the Death Certificate, Ms. Lebron was never married to Mr. Gaynes, nor did she have an ownership interest in the foreclosed premises. According to the affidavit of Catherine Gaynes, she is the surviving spouse of the late Norman Gaynes. Although they were separated at the time of his death, their marriage was never dissolved.

In April 1999, the Commissioner of Finance transferred the surplus funds from the public sale of the subject property to the New York State Comptroller in accordance with New York Abandonment Property Law § 1406. On May 8, 2009, Catherine Gaynes filed a Notice of Claim with the Kings County Clerk, claiming entitlement to the surplus money. Shortly thereafter, Ms. Gaynes submitted a motion seeking similar relief. On September 15, 2009, this Court granted the motion to the extent of distributing one-half (1/2) of the surplus fund to Ms. Gaynes. The other half remains with the Office of the State Comptroller (hereinafter, "the Comptroller") for further distribution to Norman Gaynes' estate. Defendant, Catherine Gaynes now moves seeking an order directing the Office of the State Comptroller to disburse to her the remaining one-half (1/2) of the surplus monies, plus accrued interest currently on deposit with the Office of the State Comptroller.

The Comptroller asks this court to determine whether movant has

satisfied the notice requirements contained in the Abandoned Property Law and the Real Property Actions and Proceedings Law. The Affidavits of Service annexed to movant's papers indicate that notice was provided to the Comptroller and all parties to the action which resulted in the funds being paid into court as required by Abandoned Property Law §1406(2)(a). No notice is required pursuant to RPAPL §1361(3) as the subject action is more than twenty four (24) years old and any lien would have long expired.

Movant argues that she is the former co-owner of the subject property and the heir of Norman Gaynes and, therefore, is entitled to the surplus monies. She argues that because Norman Gaynes died intestate, under EPTL §4-1.1 his spouse is entitled to inherit the first \$50,000 of his estate and one-half of the residue of his estate.

In opposition, the Comptroller argues that Ms. Gaynes is not entitled to the remaining one-half (1/2) of the surplus monies. The Comptroller's position is that surplus monies from a foreclosure sale of real property are considered personal property. Therefore, if a person dies intestate, his personal property can only be distributed to his or her "heirs in law" in accordance with the intestate statutes. Furthermore, the Comptroller argues that a surplus money fund created by a foreclosure sale is deemed to be held by the husband and wife as tenants in common and not as tenants by the entirety. Lastly, the Comptroller contends that, although Ms. Gaynes asserts she never divorced defendant Norman Gaynes, the Death Certificate identifies Mary Lebron as Norman Gaynes' surviving spouse.

Discussion:

This Court agrees with the movant and finds that she is entitled to disbursement of the remaining one-half (1/2) of the surplus monies. The Comptroller's reliance on Norman Gaynes' Death Certificate, listing Mary Lebron as his surviving spouse as proof that Ms. Gaynes is not Mr. Gaynes' surviving spouse, is misplaced. It has long been the law in the State of New York that a Death Certificate is proof of death and not of any additional facts recited therein. ***In re Gibson's Will, 29 Misc. 2d 21, 24 (Sur. Ct., Nassau Co. 1961)***. Despite the fact that Mr. Gaynes and Ms. Gaynes were separated at the time of the foreclosure and/or at the time of his death, *their marriage was never dissolved. The fact that Mr. and Ms.*

Gaynes were separated at the time of his death is of no legal significance. When "husband and wife separate without the aid of a judicial decree, they remain one legal person; and, therefore, they continue to own property acquired as tenants by the entirety just as they did prior to their separation." **Kahn v. Kahn, 43 N.Y.2d 203, 207 (1977).**

As to the Comptroller's reliance on **First Federal Sav. and Loan Assn. of Rochester v. Brown, 78 AD2d 119, supra**, that too is misplaced. It is well settled in the State of New York that when land is conveyed to husband and wife they take as tenants by the entirety. On the death of either spouse the other spouse takes the whole of the real property. **Bertles v. Nunan, 92 N.Y. 152, 156 (1883); Zorutlein v. Bram, 100 N.Y. 12, 15 (1885).** As stated in **Radcliffe v. Radcliffe, 137 Misc. 2d 859, 860 (Sup Ct, Suffolk County 1987) (citing Knight v. Knight, 25 NY2d 957 (1969), aff'g opn below 31 AD2d 267 (2d Dept 1969)** "[i]n the case of a tenancy by the entirety, the death of one of the spouses causes the interest of the surviving spouse to become absolute." The Comptroller argues that a surplus money fund arising out of a foreclosure is personal property held by a husband and wife as tenants in common. The case they cite for this proposition, **First Federal Sav. and Loan Assn. of Rochester v. Brown, 78 AD2d 119, supra**, is good law in the Fourth Department where it was decided, but the Second Department takes a different view. This split among the Departments is discussed in the **Brown** decision itself **Id at 122** and was, therefore, known to the Comptroller.

In fact, the entire line of cases relied upon by the Comptroller is from the Third and Fourth departments and, therefore, not binding on this court. The **Brown** decision cites to a "line of cases tracing its genesis to **Germania Sav. Bank v. Jung (28 Abb NC 81, 82)** [which] held that the conversion of real estate into money by foreclosure did not alter the character of the surplus, the fund continuing constructively to be considered real estate and hence the surplus moneys were considered held as tenants by the entirety (**Dunning v. Ocean Nat. Bank of City of N.Y., 61 NY 497**)." The Second Department follows the **Dunning** and **Germania** line of cases and holds surplus monies arising out of a foreclosure sale to be real property, stating that "where realty owned by husband and wife is sold in a mortgage foreclosure action, the proceeds which remain after the mortgage debt is satisfied are constructively real property held in entirety by both spouses." **First Federal Sav. & Loan Assn. v. Lewis, 14 A.D.2d 150, 154 (2d Dept 1961); Matter of Kantor v. Mesibov, 14 Misc. 3d 1228A**

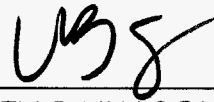
(Sup Ct, Nassau County 2007). Applying this law, the monies held by the Comptroller as abandoned property which stem from a mortgage foreclosure action are held "in entirety by both spouses" *Id.*, Mr. and Ms. Gaynes.

Based on the aforementioned case law, it follows that in the case at bar, a surplus monies fund created by a foreclosure sale of the subject property is real property held by the entirety by Norman Gaynes and Catherine Gaynes, who were still married at the time of the foreclosure. As a result, Ms. Gaynes is entitled to the full award by right of survivorship, and does not need to resort to the intestacy statute to assert her entitlement to Mr. Gaynes' portion of the surplus monies as his heir.

Therefore, the motion for an Order of Distribution is granted in all respects.

This is the Decision and Order of the Court.

Dated: May 4, 2011



LOREN BAILY-SCHIFFMAN
Justice of the Supreme Court