

**Johnson v Johnson**

2011 NY Slip Op 32288(U)

August 17, 2011

Sup Ct, Nassau County

Docket Number: 11232/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
DAVID JOHNSON,

Plaintiff,

INDEX NO. 11232/10

-against-

MOTION DATE: 07/06/11  
SEQUENCE NO. 001, 002

FAITH C. JOHNSON, MICHAEL P. JOHNSON,  
and JOHAN JOHNSON,

Defendants.

-----X

<b>Order to Show Cause, Affs. &amp; Exs.....</b>	<u>1</u>
<b>Notice of Cross-Motion, Affs. &amp; Exs.....</b>	<u>2</u>
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Upon the foregoing papers, it is ordered that the defendants' motion, brought by Order to Show Cause, for a preliminary injunction directing the plaintiff to provide defendant Faith C. Johnson with all keys and alarm codes to the property located at 108 Central Avenue, Sea Cliff, New York; enjoining plaintiff from in any way interfering with Faith C. Johnson's occupancy, use, and enjoyment of said residence; and enjoining plaintiff from interfering with Faith Johnson's son, Johan Johnson, and his family, from moving into the residence to reside with Faith Johnson, is granted to the extent directed below. Plaintiff David Johnson's cross-motion for an order directing that the defendants reimburse him for one-half of the real property taxes, insurance, and maintenance for the past six years, for the posting of a bond, for an order directing that Johan Johnson and his family not reside in the residence, and to compel discovery, is resolved as directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action brought by plaintiff to reform or set aside two deeds to the home located

[\* 2]

at 108 Central Avenue in Sea Cliff, New York. The first deed which plaintiff seeks to reform or set aside is a deed that was executed on June 30, 1991 and recorded on December 7, 1992, wherein David Johnson conveyed a fee interest in the property at issue to himself and to Faith Johnson as tenants in common. David Johnson contends that he intended only to convey a life estate to Faith Johnson in the deed recorded in 1992, and not to convey a tenancy in common to her. The second deed which plaintiff seeks to set aside is a deed dated January 30, 2006 and recorded on April 10, 2006, wherein Faith Johnson conveyed her one-half interest in the subject property to her two sons, defendants Michael Johnson and Johan Johnson, as tenants in common, while retaining a life estate for herself. David Johnson alleges that such deed is null and void and must be set aside or cancelled. David Johnson also attests that he first learned of the "mistake" in the deed recorded in 1992, wherein he conveyed a fifty percent fee interest to Faith Johnson as a tenant in common rather than conveying a life estate to her, in 2006, when the Village of Sea Cliff challenged the partial tax exemption on the property. Both in his verified complaint and his affidavit, David contends that he only learned of the "mistake" in 2006.

Plaintiff does not contest that Faith Johnson has a life estate interest in fifty percent of the property, but argues that the deed recorded in 1992 was meant to convey only a fifty percent life estate to her, not a tenancy in common. Accordingly, plaintiff argues that Faith Johnson's life estate was as a result of the 1992 deed, and not the subsequent deed recorded in 2006. Plaintiff argues that Faith Johnson knew that he was conveying only a life estate to her in the deed recorded in 1992, and, as such, it was a mutual mistake. Faith Johnson, however, attests that it has always been her understanding that David Johnson conveyed a fifty percent fee ownership interest in the property to her and not merely a life estate.

Defendants contend that based upon Faith Johnson's status as life tenant, regardless of which deed conveyed a fifty percent life estate to her, Faith Johnson has a right to occupy the property at issue. Defendants also contend that as a life tenant, Faith Johnson may choose who can live with her in the residence. Defendants have requested injunctive relief allowing Faith to occupy the home with her chosen guests, as they claim that David Johnson has changed the locks and installed an alarm code, keeping Faith Johnson out of the residence. Defendants argue that Faith Johnson needs and wishes to move into the premises at issue at this time because her son Michael Johnson, who has cared for her in Maryland since 2005, is relocating out of the country. As she has no other relatives nearby, and as her son Johan Johnson lives in New York, she wishes to occupy the property in which she retains a life estate. She also desires that Johan Johnson and his family move into the premises to help care for her. As the Court has already ordered that the keys and alarm code be provided to Faith Johnson, defendants' request for said

relief is deemed moot.

It is well settled that to be granted a preliminary injunction, a movant must demonstrate (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of the equities favors his position. (*Hightowner v. Reid*, 5 A.D.3d 440, 772 N.Y.S.2d 575 (2d Dept. 2004)). In the instant action, the defendants have sufficiently demonstrated the necessary elements to warrant the granting of a preliminary injunction to defendant Faith Johnson.

To begin, defendant Faith Johnson has demonstrated the likelihood of ultimate success on the merits. The deed recorded in 1992 indicates, within its four corners, that plaintiff conveyed a one-half fee interest in the property to Faith Johnson as a tenant in common. The deed recorded in 2006 indicates, within its four corners, that Faith Johnson retained a life estate and conveyed her fifty percent interest in the property equally to defendants Michael Johnson and Johan Johnson as tenants in common. Neither deed contains language limiting the use of the property by Faith Johnson. As plaintiff contends that he intended to convey a fifty percent life estate to Faith Johnson by the deed recorded in 1992, at a minimum, it is uncontested that Faith Johnson has a fifty percent life estate in the property. A reformation of the deed recorded in 1992 would reflect same, if said relief is ultimately granted to plaintiff. As Faith Johnson has a life estate in fifty percent of the property, she has a right to use and occupy the premises. While a remainderman may have fee title and a greater interest in the property than the life tenant, the life tenant is generally deemed an owner of the property as well and is entitled to all of the benefits and burdens of such ownership, although not a fee ownership, so long as the remainder interest is not affected. (*Lai-Hor Ng Yiu v. Crevatas*, 2011 WL 3444565 (Kings Cty. Sup. Ct. 2011); *See also, Matter of Fisher*, 169 Misc.2d 412, 645 N.Y.S.2d 1020 (Rockland Cty. Sur. Ct. 1996); *See also, Board of Educ., Hewlett-Woodmere Union Free School Dist. v. Board of Assessors of County of Nassau*, 54 A.D.2d 978, 389 N.Y.S.2d 27 (2d Dept. 1976)(life tenant is an owner), *lv. denied* 41 N.Y.2d 805 (1977)). A life tenant has the right of possession and may exclude others from possession during her lifetime. (*Matter of Carey*, 249 A.D.2d 542, 627 N.Y.S.2d 131 (2d Dept. 1998); *See also, Torre v. Giorgio*, 51 A.D.3d 1010, 858 N.Y.S.2d 765 (2d Dept. 2008)). A life estate conveys exclusive ownership of the land during the lifetime of the life tenant and is distinguishable from the mere right to occupy a property, which is a personal interest only and not an interest or estate in the property. (*Mayer v. Mayer*, 11 Misc.3d 1051(A), 814 N.Y.S.2d 891 (Queens Cty. Sup. Ct. 2005); *See also, Matter of Strohe*, 5 Misc.3d 1028(A), 799 N.Y.S.2d 164 (Nassau Cty. Sur. Ct. 2004)).

Further, the deed recorded in 1992 clearly conveys a tenancy in common to Faith

Johnson. There has been no evidence presented, other than David Johnson's own self-serving affidavit, to indicate that the deed recorded in 1992, conveying a fee interest of fifty percent to Faith Johnson as a tenant in common, is incorrect, fraudulent, or the result of a mistake. A disposition of property to two or more persons creates in them a tenancy in common, unless declared otherwise. (*Matter of Bonanni*, 250 A.D.2d 1022, 673 N.Y.S.2d 269 (3d Dept. 1998)). There is a strong presumption in favor of the tenancy in common, and to overcome this strong presumption, a party must establish by clear and convincing evidence that a joint tenancy, or in this case, a life estate, was intended to be created rather than a tenancy in common, and that language manifesting such an intent was mistakenly omitted from the instrument of conveyance by the scrivener. (*Estate of Menon v. Menon*, 303 A.D.2d 622, 756 N.Y.S.2d 639 (2d Dept. 2003); *See also, Matter of Vadney*, 83 N.Y.2d 885, 634 N.E.2d 976 (1994); *See also, EPTL §6-2.2*). There is insufficient evidence before this Court to demonstrate that the deed recorded in 1992 improperly conveyed a tenancy in common to Faith Johnson rather than a life estate. As such, the defendant has demonstrated the likelihood of ultimate success on the merits. Further, while David Johnson blames the mistake on a scrivener error, the attorney who drafted the deed is deceased and cannot attest to same.

Additionally, and importantly, the Court notes that the plaintiff's causes of action to reform or set aside the deeds at issue appear to be barred by the expiration of the applicable statute of limitations, as those causes of action were asserted more than six years after accrual and more than two years after discovery. (*See, CPLR §§213 and 203(g)*; *See also, Mayer v. Mayer*, 11 Misc.3d 1051(A), 814 N.Y.S.2d 891 (Queens Cty. Sup. Ct. 2005)).

The deed recorded in 1992, as it stands, conveyed a fifty percent fee interest to Faith Johnson, as a tenant in common with David Johnson. As noted by the Court in *Anonymous v. Anonymous*, 2004 WL 396492 (N.Y. Cty. Sup.Ct. 2004), *quoting*, 5A Warren's Weed New York Real Property, Tenancy in Common, § 7.04:

"A tenant in common, although owner of an undivided share only in the land, differs from a joint tenant in having a several and distinct estate therein. And, except for the fact that he has not the exclusive possession, he has the same rights in respect to his share as a tenant in severalty. Each tenant in common holds his title and interest independently of the other tenants in common. Thus, a tenant in common may transfer, devise, convey, lease, mortgage or otherwise encumber his interest in the land without seeking the consent or joinder of his co-tenants to the transaction. A tenant in common, therefore, can convey his interest to another person or persons, and, upon that conveyance one tenancy in common is

terminated and a new one arises among the new tenants in common.” (*Id.*)

As a tenant in common, Faith Johnson was entitled to convey her interest in the property to defendants Michael Johnson and Johan Johnson, while retaining a life estate for herself.

Accordingly, she is entitled to occupy the property.

As a the holder of a life estate, having the right of possession of the premises, Faith Johnson is entitled to have her son, Johan Johnson, or any other guest, reside with her. (*See, Giuffrida v. Giuffrida*, 170 Misc.2d 63, 649 N.Y.S.2d 773 (N.Y. City Ct. Yonkers 1996); *See also, Soyer v. Pericone*, 193 A.D.2d 665, 597 N.Y.S.2d 472 (2d Dept. 1993); *Matter of Berlin v. Herbert*, 48 Misc.2d 393, 265 N.Y.S.2d 25 (Nassau Cty. Sup. Ct. 1965)(holding that inasmuch as a tenant in common may transfer, devise, convey, lease, mortgage or otherwise encumber his interest in land without seeking consent or joinder of cotenant to the transaction, there is no reason why cotenant cannot invite anyone to live with him or her upon the premises).

As the defendants have demonstrated the likelihood of ultimate success on the merits, irreparable harm to Faith Johnson by being denied access to a property in which she has a life estate and is entitled to occupy, and that a balancing of the equities favors the defendants’ position, the defendants have demonstrated their entitlement to a preliminary injunction. Accordingly, it is hereby ordered that upon the posting of an undertaking by the defendants in the amount of three-thousand five-hundred dollars (\$3,500.00), pursuant to CPLR §6312(b), the plaintiff is enjoined from interfering with Faith Johnson’s occupancy, use, and enjoyment of the premises at issue, 108 Central Avenue, Sea Cliff, New York, and is further enjoined from interfering with Faith Johnson’s invitation of guests, including her son Johan Johnson and his family, to live with her at said premises, pending the conclusion of this action. The amount of the undertaking required to be posted by the party seeking a preliminary injunction is within the discretion of the Court and must relate to the amount of damages and costs which may be sustained by reason of the injunction. (*See, CPLR §6312(b); Blueberries Gourmet v. Aris Realty Corp.*, 255 A.D.2d 348, 680 N.Y.S.2d 557 (2d Dept. 1998)). As the total property taxes per year average seven-thousand dollars (\$7,000.00), and as defendant Faith Johnson’s request for a preliminary injunction seeks nothing more than to exercise her rights to her life estate in the property at issue, this Court finds that the posting of half of one year’s taxes, in the amount of three-thousand five-hundred dollars, to be a sufficient undertaking. Accordingly, the portions of plaintiff’s motion requesting (1) that a posting of a \$60,000 undertaking be required of the defendants prior to the granting of any preliminary injunction; and (2) that an order directing that defendant Johan Johnson and his family be directed not to reside in the premises at issue; are denied.

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With respect to plaintiff's motion for reimbursement of the one half of the real property taxes, insurance, and maintenance due and owing on the life estate of defendant, Faith Johnson, for the past six years, said request is premature. The defendants contend that Faith Johnson made payments from the time David Johnson first obtained title in 1989 until she moved to Maryland in 2005. As such, the Court is unable to determine upon the submissions before it what costs were paid by whom for the entire period that Faith Johnson and David Johnson shared ownership in the property. While the defendants do not dispute that an accounting of the payments made by Faith Johnson and by the plaintiff for property taxes, insurance, and necessary maintenance costs is needed, there is not sufficient evidence before this Court to determine the amount of said expenses paid by each party. Life tenants and cotenants in common are each responsible for the payment of taxes, insurance, and reasonable and necessary repairs to the premises, but plaintiff's request for an order requiring defendants to reimburse the plaintiff in the amount of \$23,840.00 for the past six years of said expenses, without any accounting for the payments made by Faith Johnson before said time, is premature. (See generally, *Matter of Gaffers*, 254 A.D. 448, 5 N.Y.S.2d 671 (3d Dept. 1938); See also, *Board of Educ., Hewlett-Woodmere Union Free School Dist. v. Board of Assessors of County of Nassau*, 54 A.D.2d 978, 389 N.Y.S.2d 27 (2d Dept. 1976)).

With respect to plaintiff's request for an order directing an expedited schedule for depositions of the parties, it is the Court's understanding that depositions of all parties have now been completed. If any party to this action has not been deposed, it is hereby ordered that said party witness be produced for a deposition within forty-five (45) days of this Order. With respect to plaintiff's request for an order compelling defendants to comply with plaintiff's demands for bills of particulars, the Court has reviewed the demands for same and determined that they are overbroad, unduly burdensome, and seek evidentiary information beyond the allegations of the counterclaims and the affirmative defenses asserted. Accordingly, it is ordered that plaintiff's ten page demands for bills of particulars, addressed to each defendant and dated February 17, 2011, are hereby stricken. The plaintiff's demands are palpably improper as they seek evidentiary material and information for which the defendants do not bear the burden of proof. (*Hillside Equities v. UFH Apts*, 297 A.D.2d 704, 747 N.Y.S.2d 541 (2d Dept. 2002)). The object of a bill of particulars is to amplify the pleading, limit the proof, and prevent surprise at trial, not to gain disclosure of evidentiary material. (*Arroyo v. Fourteen Estusia Corp.*, 194 A.D.2d 309, 598 N.Y.S.2d 471 (1<sup>st</sup> Dept. 1993); *Ginsberg v. Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233 (2d Dept. 1984)). The ten page demands served by the plaintiff herein are excessively detailed and improperly request material that is evidentiary in nature,

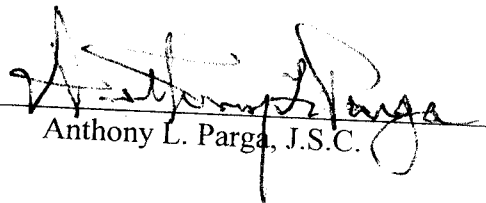
[\* 7]

including the production of documents and the detailing of communications. (*See, Arroyo v. Fourteen Estusia Corp.*, 194 A.D.2d 309, 598 N.Y.S.2d 471 (1<sup>st</sup> Dept. 1993); *Philipp Bros. Export Corp. v. Acero Peruano S.A.*, 88 A.D.2d 529, 450 N.Y.S.2d 28 (1<sup>st</sup> Dept. 1982)(holding that the vacatur of a demand for bill of particulars is appropriate where the demand requested a massive quantity of minute, detailed information of an evidentiary nature, and the furnishing of such information would be unreasonably burdensome); *DeMarco v. Consolidated Rail Corp.*, 131 A.D.2d 627, 516 N.Y.S.2d 712 (2d Dept. 1987)). The Court notes that much of the demanded information can be obtained by the plaintiff at the depositions of the defendants and is inappropriate in a demand for a bill of particulars.

This constitutes the decision and order of this Court.

No directive contained within this Order shall be deemed to supercede or vacate the restraining order issued by the Nassau County Family Court, dated July 7, 2011.

Dated: August 17, 2011

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
AUG 19 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE