

**Clark v Clark**

2011 NY Slip Op 33541(U)

December 20, 2011

Supreme Court, Nassau County

Docket Number: 005514/2008

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

\_\_\_\_\_  
WINIFRED CLARK, Individually, and on behalf of  
Trust U/W/O WILLIAM P. CLARK,

Plaintiff,

-against-

JAMES CLARK, JR.,

Defendant.

\_\_\_\_\_  
WINIFRED CLARK,

Plaintiff,

-against-

JAMES CLARK, JR.,

Defendant.

\_\_\_\_\_  
JAMES P. CLARK, JR.,

Plaintiff,

-against-

WINIFRED Q. CLARK and RICHARD QUINN,

Defendants.

**TRIAL/IAS PART 7**

Action No. 1

INDEX NO.: 005514/2008 ✓  
MOTION DATE: 11/15/2011  
MOTION SEQUENCE: 11

**FOR THE APPOINTMENT  
OF A RECEIVER**

Action No. 2

INDEX NO.: 019481/2009 ✓

Action No. 3

INDEX NO.: 005941/2010 ✓

The following documents were read on these motions:

Motion by Winifred Clark for the Appointment of a Receiver .....	1
Memorandum of Law in Support of Motion .....	2
Affidavit in Opposition to Motion .....	3
Memorandum of Law in Support of Opposition .....	4
Exhibits to James P. Clark Jr.'s Opposition .....	5
Brief for Defendant - Appellant Respondent / Defendant - Appellant/Plaintiff Appellant - Respondent, James Clark, Jr. Answering and Reply Brief for James Clark, Jr. [from pending appeal] .....	6
Reply Affirmation of Ronald Rosenberg .....	7

Winifred Clark, plaintiff in action numbers one and two and defendant in action number three has moved for the appointment of a receiver for the properties that she and James P. Clark, Jr. Jointly own, (28 properties) as well as properties to which she disputes ownership (3) and a third property, pursuant to CPLR§6401. The original complaint is a partition action, calling for an accounting and claiming a breach of fiduciary duty.

Section 6401 requires the movant to prove, by clear and convincing evidence that “there is a danger that the property will be removed from the state, or lost, materially injured or destroyed.”

“The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of property from a party without the benefit of a trial on the merits.” (Modern Collection Association, Inc. v. Capital Group Inc., 140 AD2d 594 [2d Dept 1988].

Clearly the appointment of a receiver would be a harsh remedy and should not be lightly exercised by the court, unless the movant has shown by clear and convincing evidence that there is a danger of irreparable loss and that a receiver is required to protect the parties interests ( Secured Capital Corp. Of NY v. Dansher, 263 Ad2d 503, 504 [2d Dept 1999] (See also Carmody Wait, NY Practice, Vol 14 at 641].

It is also generally held that where the value of a subject real estate provides security to the party seeking a receivership then the appointment of a receiver would not be appropriate.

(See *Kristensen v. Charleston Square Inc.*, 273 AD2d 312 [2d Dept 2000]; a judicial dissolution proceeding).

In other words where the claims of financial defalcation could be secured by the adverse party's interest in the property it is argued it would not be appropriate to appoint a receiver.

## DISCUSSION

As background Winifred Clark is widow of William Clark. All interests she has in the properties flow through her late husband.

James P. Clark, Jr. and William Clark obtained their interest in properties from their father and uncle. They also purchased other properties on their own.

The brothers treated the properties in a rather unusual fashion for tax purposes. One brother would claim and pay taxes on 50% of the properties as though he was 100% owner and his brother did the same. Apparently James has managed the properties, at last from the time of William's passing, on his own; and again apparently without compensation. In recent years he has been assisted by Winifred's son, also James P. Clark.

The court had previously attempted to settle the matter and then referred it to mediation. All efforts have met with failure.

Winifred sets forth numerous arguments to support her request along with an affidavit, by David Marcus an accountant who examined books and records given him by Winifred's counsel including two items entitled "rent roll" and "general ledger."

### 1. Rental Income:

Winifred alleges that her share of rents should be at minimum \$30,000 per month not including a share of disputed properties. She is paid \$15,000 per month. She alleges the additional monies due her are deposited by James in diverse accounts secreting the profits from her. Her position is supported by the affidavit of her forensic accountant, David Marcus.

How James determines what Winifred should be paid monthly is unclear. What he deducts from the rent roll has not been set forth in this motion. Giving credence to the Marcus

affidavit he is not paying Winifred for her share. Whatever that might be.

James offers no evidence of any kind on this issue but claims Mr. Marcus is "incorrect."

## 2. Financial Impropriety:

Winifred points out, and it is not disputed, that James keeps two (2) sets of books on the properties (Rent Roll and General Ledger). The rent roll reflects all rents received but the general ledger does not. She argues that this is purposeful to under report income. This has resulted, so argues her counsel, in hundreds of thousands of dollars of unreported income impacting on her distributions, so she believes. Defendant does not comment on this in his opposition.<sup>1</sup>

## 3. Under reporting Income:

Winifred argues that James has admitted under reporting rental income by reducing actual income by fabricating expenses such as broker commissions and repairs to decrease profit. (Between 1994 - 2008). It is alleged this may rise to the million dollar level. The basis of this is inferred from a small part of his deposition, which his counsel refers to as a "quip."

## 4. Leases:

Winifred's counsel argues that James has leased numerous properties for below market value, fails to actually enter into leases resulting in month to month tenancy's and few renewals. Twenty of 32 buildings do not have leases.

Therefore this results in less income to Winifred and reducing - she argues - the appraised value of the individual properties. Properties with leases being more valuable than

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<sup>1</sup>The general argument of defendant is a claim of bookkeeping errors or oversight. There is a total of \$1,064,384 in rent discrepancies, of which apparently \$280,000 was received but not recorded in either the rent roll or general ledger. There is no explanation of how James determined what rent was received for varying periods for various buildings going back to 1994, in that there was a lack of entries in either book to support it.

those without. Thus she argues she needs a receiver to take over management to prevent further decrease in building value.

James' counsel argues that most of the properties are in the Greenpoint area and we don't understand how hard it is to keep tenants in these places much less tenants with leases. No expert of any nature has been proffered to support counsel's position. Whether the court is to accept this argument or not, the papers reflect the buildings are occupied and for the most part rent is collected.

#### 5. Commingling of Funds:

Winifred alleges James co-mingled rental income and paid expenses on his separate property from the funds. It is not denied by James that some expenses on his property were paid from such funds, however, he argues that he repaid those amounts; which is not disputed by Winifred.

#### 6. Defendant James P. Clark, Jr. Fails to Maintain Accurate Business Records

To say that obtaining discovery from James Clark as to the records he kept for the properties was difficult is to put it mildly. Discovery has come in dribs and drabs as he apparently found it in his office. The picture painted to the court of the office he occupies is only missing an eyeshade, a bottle of ink and a quill.

However that is not Winifred's fault. (Winifred did work in the office for a period of time so she had some familiarity with it).

He consistently failed to produce normal records such as bank records, check books or leases; and what was produced had inconsistencies. There appears to be no consistency in the fashion in which he maintains the records.

She argues that this has and will impair her ability to obtain full records and an accounting.

#### 7. Defendant Deposits Rent Checks in a Variety of Accounts and Writes Check from a Variety of Accounts.

The discovery process and deposition of James Clark supports the claim. This does not appear to be disputed. Once again, not good business management and may make it hard (and expensive) to conduct an accounting in the future.

8. Defendant has failed to pay Taxes resulting in Tax Liens placed on one or more Buildings (including notice of tax sale auction).

It is not argued that these above did occur. However this appears not to have been an intentional act on his part not to pay, and, at least on one occasion he lumped tax payments into one check which resulted in a mis application of the payment by NYC. However, this explanation is not sufficient to explain the "90 day notices to sell Tax Liens" date in February 2008 for four properties, specifically 56-60 59<sup>th</sup> Street (Block 2669, Lot 64), 59-02 55<sup>th</sup> Street (Block 2629, Lot 10), and 243 Freeman Street (Block 2506, Lot 49) and 57-18 59<sup>th</sup> Street (Block 2674, Lot 11).

These liens were sold ( see Ex.U to moving papers) and tax lien foreclosure proceedings were started in 2010 (Ex. T) for 57-18 59<sup>th</sup> Street and 56-60 59<sup>th</sup> Street.

For a tax lien to get to this late stage - sale - numerous notices that were apparently sent to James had to have been ignored.

A similar scenario existed with tax lien notices for property at 58-99 5<sup>th</sup> Street, 59-02 55<sup>th</sup> Street; + 58-70 57<sup>th</sup> Street. (Placed on "Tax Lien List").

These tax payment failures cannot be merely attributed to his bunching together payments for three properties or one check. A method that a wise property manager would not take for fear of confusion by NYC taxing authorities. They are examples of a systemic failure to properly manage the properties and pay taxes timely, threatening the loss of the properties. This again argues plaintiff, supports the appointment of a receiver.

Despite argument by James that the liens were in error and the taxes had been paid. Winifred points out that counsel had to be retained to defend the actions. For then such an action or inaction by James reflects his inability to manage the property and supports the appointment of a receiver.

Counsel for James Clark has disputed the factual accuracy of some of Winifred's arguments and argues that Winifred's counsel "opines" without evidentiary proof. He points out that if the court was to accept all of David Marcus's affidavit, despite its weaknesses, it would indicate that James has withheld or misappropriates between 1.8 and 3.1 million dollars.

Fourteen of the properties alone and out of 32, according to Winifred, one valued at over 5 million dollars. That combined with the fact that James owns eight properties on his own (so argues his lawyer) would clearly indicate that Winifred is well secured by the value of the commercial properties within her grasp pursuant to a future court order.

James' counsel also argues that Winifred has shown bad faith (Along with her counsel) in not producing documents supporting her claim for an accounting, which caused the mediation to fail. Her counsel on the other hand blames him for the failure of the mediation.

James counsel also points to Winifred's action in executing three deeds in effort to convey to herself ownership (partial) in 3 properties solely owned by James.

There is ample blame to go around when looking for a reason behind the failure of the mediation. The court will not explore that issue.

Winifred's counsel strongly states that she has more than satisfied the requirements of CPLR 6401 (a) and is entitled to the appointment of a receiver to protect her rights in these income-producing rental properties and to ensure that she receives her 50% share of the net profits of the buildings' (citing to *Singh v. Brunswick Hosp.*, 2 AD3d 433) [2d Dept. 2003]

No one can disagree on the standard as set forth in CPLR§ 6401 (a). That the court has the discretion to appoint a temporary receiver of the property upon application of a party with apparent interest in the property "where there is danger that the property will be.... lost, materially injured or destroyed."

In the instant case Winifred Clark is a tenant in common<sup>2</sup> with James P. Clark, Jr. in numerous properties and contests ownership in others. Clearly she meets the test of a person with

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<sup>2</sup> They are not shareholders, partners or anything but tenants in common

“apparent interest in the property.”

There are numerous cases cited by both sides which have both supported the appointment of a temporary receiver and also denied such a request. It is a fact sensitive question.

Here we have over 40 properties that could require a receiver and eventually a property manager if the court grants Winifred’s motion. The court cannot imagine the cost, but using a simplistic 5% number for the receiver and multiplying by the monthly net rent (court not aware of gross rent) according to Mr. Marcus’ report, it would cost over \$12,000 per year at a minimum.

If these properties are truly at risk of being lost, materially injured or destroyed” this would be a small price to pay.

To Review:

1. Rental Income -

Accepting Mr. Marcus’s report on rental income Winifred is not receiving her fair share of the rental income. However this is an issue to be determined after an accounting and an eventual ruling by the court (if needed). It is not on its own, a reason to support a receiver.

2. Financial Impropriety and 3. Under reporting Income -

James Clark keeps two sets of books for the properties which do not smoothly interface (to be kind). This may result in serious income tax problems but it is not a sufficient basis for the appointment of a receiver if it was the only issue before the court.

4. Leases-

James has leases on some of the properties but not all (12 of 32 have leases). Some are month to month tenancies which at one time had leases. The excuse is that we, anyone but James, doesn’t understand the neighborhoods where these buildings are located.

These grounds alone may support the appointment of a receiver because they reduce the value of the proeprties.

#### 5. Commingling of Funds and 6. Failing to Keep Accurate Building Records -

The mixing of income from the properties does not support the appointment of a receiver. Though it is not the most advisable book keeping method it has allegedly worked for James P. Clark, Jr. It does not work for Winifred, and upon close examination it creates a tangled web extremely difficult to resolve.

If Winifred believes James has literally stolen from her, she is free to go to the DA's office with her complaint.

His failure to keep better records is clearly a negative, however, once again, it does not on its own support her application for a receiver.

#### 7. Deposition of Rent Checks in Multiple Accounts -

Again not a good practice which should be corrected but not one on its own that would cause the court to appoint a receiver.

#### 8. Tax Liens -

The evidence presented indicates a number of times a payment was missed which resulted in tax problems on certain properties. These have been cleared. The explanation given for how the liens came about is not clear.

Though tax liens and/or eventual auction could clearly result in the loss of a property. What led to this problem we are led to believe appears to have been an exception to the manner in which James has managed the properties, paid the tax and handled the repairs over many years.

James P. Clark, Jr. is an octogenarian. He manages these numerous properties as though he was in the mid 20<sup>th</sup> Century it has not yet brought about the loss of a property nor materially injured any of the properties. (Exclusive of reduction in value due to lack of leases)

However when you combine all his actions, tax payment defaults, under reporting income, double books, failure to pay Winifred her fair share of income, misuse of joint income for personal needs and essentially an object failure to clearly explain most of the above, the appointment of a receiver now seems to be most appropriate and is supported by clear and

convincing evidence.

The court is loathe to appoint a receiver in most cases. I have done so only rarely in my entire tenure on the bench. I pull back from such appointments for many reasons including the loss of income to the parties.

It is clear that of the parties had taken advantage of the courts efforts of settlement or those of the mediator this motion would not have been made. Therefore the court rules as follows:


The court orders the appointment of a receiver for the 28 properties in which that parties are tenants in common (each a 50% owner). Said appointment shall be effective January 27, 2012.

The receiver shall be named by my successor in this part.

If the parties enter into an agreement dividing the 28 properties on or before that date, by themselves or with the assistance of the court appointed mediator, Jeffrey Miller, Esq., the order appointing the receiver will be vacated.

This constitutes the decision and order of the court.

Dated: December 20, 2011

  
J.S.C.

**ENTERED**  
JAN 04 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE