

Palmieri v Frederick D'Apice, LNV Corp.

2012 NY Slip Op 32456(U)

September 11, 2012

Supreme Court, Suffolk County

Docket Number: 20329/2011

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

COPY

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 07-13-2011
ADJ. DATE: 01-05-2012
MOT. SEQ: 001 MG

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X	
JOANNE PALMIERI,	:
	:
Plaintiff(s),	:
- against -	:
	:
FREDERICK D'APICE, LNV CORPORATION	:
(their successors/assigns), MIDLAND FUNDING,	:
LLC and OFFICE OF THE TREASURER OF	:
SUFFOLK COUNTY,	:
	:
Defendant(s).	:
-----X	

Upon the following papers numbered 1 to 20 read on this motion seeking a partition of real property ; Notice of Motion and supporting papers numbered 1- 12; Affirmation in Opposition and supporting papers numbered 17-20; it is,

ORDERED that this motion (seq. 001) by plaintiff, Joanne Palmieri for an Order converting title of the former marital residence of the parties to a tenancy in common; seeking summary judgment granting her partition of said former marital residence, and granting summary judgment directing the return of \$11,679.92 to her, is granted to the extent set forth herein; and it is further

ORDERED that the subject premises, to wit: 14 Laurel Road, Lindenhurst, New York (SCTM # 0100-128.00-03.00-062.000) is deemed to be held by the parties as tenants in common, and it is further

ORDERED that the portion of the motion by plaintiff for the appointment of a temporary receiver is hereby is granted and Donald Kitson, Esq., 282 Helm Lane, Bay Shore, N.Y., 11706,

is hereby appointed temporary receiver for the purpose of ensuring the continued maintenance, upkeep and receipt of any rents of the subject premises pending the sale thereof; and it is further

ORDERED that the premises known as 14 Laurel Road, Lindenhurst, New York (SCTM # 0100-128.00-03.00-062.000) be partitioned and sold at a public sale; and (iii) directing an accounting regarding expenditures of the subject properties during the parties' joint ownership as tenants in common of the subject properties

ORDERED that Karl Bonheim, 631-208-9007, is hereby appointed Referee and directed to ascertain and determine the respective rights, shares and interests of the plaintiff and defendant in the proceeds of the sale of the subject properties; and it is further

ORDERED that the referee shall be empowered to conduct the sale of the premises, hold hearings, which he/she shall determine in his/her sole discretion to be necessary, regarding any issues related to the completion of his/her accounting, including but not limited to, to ascertain whether the properties are encumbered by mortgages and, if so, to compute the amount due for principal, interest and other disbursements under the terms of said mortgage; to take proof of the parties' title and interest in said properties; and any issues of expenditures by the parties for real property taxes and mortgage payments, as well as any capital improvements made to the properties during the time that the defendant maintained exclusive occupancy and any discovery necessary to any issues raised between the parties; and to report whether the properties or any part thereof are so circumstanced that a partition of the properties can not be made without great prejudice to the owners; and it is further

ORDERED that the Referee shall ascertain and report whether there is any creditor not a party who may have or has a lien on the undivided share or interest of any party; and it is further

ORDERED that upon his/her acceptance of this appointment, the Referee shall certify that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 35), including but not limited to, §36.2[c] ("disqualification from appointment"), and §36.2 ("limitations on appointments based upon compensation") and file same with the Clerk of the Court; and it is further

ORDERED that an accounting will be held by the Referee to ensure that the party's rights are fixed in such a manner that any Order which may issue from this Court will work full and complete justice as between them; and it is further

ORDERED that the Referee's fee and all costs and expenses to be incurred in the execution of his/her responsibilities shall be shared equally by the parties. The Referee shall submit an affirmation of legal services to the Court, and it is further

ORDERED that the defendant is directed to account for any and all rents received for the subject properties from the time the parties became tenants in common until the properties are

sold and to provide said accounting to the Referee for inclusion in his report, and it is further

ORDERED that plaintiff shall have judgment for \$11,679.92 against the defendant which sum shall be paid to the plaintiff at the office of her attorney within thirty days of the date of service of a copy of this Short Form Order with Notice of Entry, and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

Plaintiff commenced this action seeking to partition the subject property, the former marital residence of the parties. An action for partition is equitable in nature and is controlled by equitable principles not in conflict with applicable statutory principles

As a general principle, "one who holds an interest in real property as a tenant in common may seek physical partition of the property, or a partition and sale thereof unless it appears that physical partition alone would greatly prejudice the owners of the premises" (*Bufogle v Greek*, 152 AD2d 527, 528). It is without question that a tenant in common has a right to have real property partitioned. In the absence of an agreement against partition, partition amongst tenants in common of real property is a matter of right where they do not desire to hold and use property (see *Smith v Smith*, 116 AD 810). The right to partition has been long recognized as a "valuable part of such interest in that it affords the owner a means of disposing of his interest which cannot be defeated by his co-owners" (*Casolo v Nardella*, 275 AD 502). The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL §901, the remedy is always subject to the equities between the parties. (*Arata v. Behling*, 57 A.D.3d 925, 926).

In support of her application, plaintiff submits her affidavit, an attorney's affirmation, copies of the pleadings, and copies of the a deed showing that the parties were tenants by the entirety of the subject property and copies of the parties' Judgment of Divorce dated October 11, 2010. Upon the divorce of the parties in 2010, title to the former marital residence of the parties was automatically converted from a tenancy by the entirety to tenants in common (see, *Matter of Violi*, 65 N.Y.2d 392). Defendant fails to raise any issue of fact which would preclude partition. Based upon these submissions, plaintiff has demonstrated a *prima facie* entitlement to summary judgment on the issue of partition (see, *Dufour v. Lobdell*, 74 Misc.2d 460.)

Inasmuch as defendant's reply affidavit does not dispute that the parties are divorced or that the parties held title to the house as tenants by the entirety, summary judgment granting partition of the property is granted. (see, *Zuckerman v. City of New York*, 49 NY2d 557,427 NYS2d 595).

In light of the foregoing, an order of reference is appropriate. As noted herein, the Referee is empowered to sell the property at a public auction, supervise discovery relating to any accounting issues raised between the parties and to conduct a search for any creditors (see RPAPL §913) as well as to take into account any capital improvements made by the defendant.

This order of reference is made to ascertain the rights, shares and interest of the parties in the subject properties and establish their respective interests in the net proceeds of any future sales. In that regard, the Referee shall determine whether an appraisal is needed and if so, the Referee will order an appraisal without further Order of the Court. The parties may present appraisals of the subject properties to the Referee. Also, the Referee is empowered to hold hearings he deems necessary, including but not limited to, the issues of expenditures by either party, as, e.g., for real property taxes.

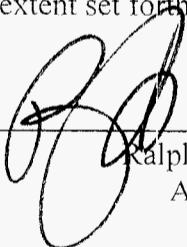
Plaintiff also seeks summary judgment awarding her \$11,679.92 representing her half of the \$23,359.84 settlement of a personal injury claim in 2010 which defendant acknowledges he received and kept. In support of her application, plaintiff submits copies of three settlement checks totaling \$23,359.84. In response, defendant does not deny that he endorsed the checks and deposited them to his account, instead, he claims that he had "permission" to sign plaintiff's name to the checks and states that plaintiff authorized him to "receive all the monies". This claim is difficult to believe in light of the deteriorated state of the parties' marriage at the time the checks were received by the defendant. Moreover, and in any event, defendant failed to submit proof in admissible form which would establish his claim that plaintiff permitted him to endorse and retain the funds.

Once plaintiff offers evidentiary proof in support of her claim, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014).

Since the defendant has failed to raise a triable issue of fact with regard to the conversion of the plaintiff's portion of the settlement proceeds and inasmuch as his affidavit in opposition is patently without merit, summary judgment on plaintiff's claim for return of half of the personal injury settlement proceeds totaling \$11,679.92 is appropriate (*see generally, Alvarez v Prospect Hosp.*, 68 NY2d 320).

Accordingly, plaintiff's motion is granted to the extent set forth herein.

Dated: 9/11/12
 RIVERHEAD, NY



 Ralph T. Gazzillo
 A.J.S.C.

NON-FINAL DISPOSITION

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