

Gapihan v Hemmings
2012 NY Slip Op 33750(U)
May 22, 2012
Supreme Court, Kings County
Docket Number: 39036/05
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May, 2012

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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GRACE HEMMINGS GAPIHAN,

Plaintiff,

- against -

Index No. 39036/05

THOMAS H. HEMMINGS AND ANTHONY LAMBERTI, ET AL.

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2, 3 _____
Opposing Affidavits (Affirmations) _____	4, 5, 6, 7 _____
Reply Affidavits (Affirmations) _____	8 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	9-11 _____

Prior to 2004, Carmen Hemmings transferred ownership to the premises located at 399 Cornelia Street in Brooklyn to her children, David Hemmings, plaintiff Grace Hemmings Gapihan, and defendant Thomas Hemmings. Carmen and David lived in the main apartment

in the premises. David Hemmings died on December 22, 2003, and, in or about 2004, a guardian was appointed for Carmen Hemmings. Plaintiff alleges that defendant assumed exclusive control and occupancy of the premises as of January 1, 2004; defendant asserts plaintiff abandoned the premises.

The following facts are taken from the decision and order of the Appellate Division, Third Department, in *Gapihan v Hemmings*, 80 AD3d 1138 [3d Dept. 2011]). Plaintiff and defendant own an apartment building as tenants in common. In December 2005, plaintiff commenced a RPAPL article 9 action seeking to partition the property. Plaintiff moved for summary judgment, which was granted by this court to the extent that an interlocutory judgment was entered declaring that plaintiff and defendant each owned an undivided one-half interest in the property and directed that the property be sold by a referee at a public auction at the courthouse. The referee received a private offer from a third party to purchase the property for \$515,000, but plaintiff insisted that the sale be conducted at public auction. The referee moved for leave to conduct the private sale without plaintiff's authorization, which this court granted to the extent of authorizing the referee to advertise the property for sale for a sum in excess of \$515,000, and if no offer was received in excess thereof, to sell it to the third party. The Second Department granted a stay and transferred the matter to the

Third Department for disposition. That court held that the referee had no standing to seek a modification of the interlocutory judgment since he was not a party affected by any outcome. Accordingly, the Third Department modified the order, concluding that this court should have denied the referee's motion.

According to the referee's Final Report, the sale took place on May 27, 2011. Four bidders, the plaintiff, the defendant, and two outside bidders, bid on the property. The property was sold to plaintiff for \$355,000. Defendant moved, *inter alia*, to stop the auction and, once it was held, to set the sale aside. The referee states he spent over 50 hours during the past three years on this contentious matter. In this motion, the referee moves by order to show cause to terminate this partition action, to accept his final report, and to distribute the funds to the parties. He requests a fee of \$20,000 to be divided equally between plaintiff and defendant, and another \$5000 from defendant Thomas Hemmings for the frivolous motions he made to which the referee had to respond. The guardian for Carmen Hemmings, Anthony J. Lamberti, Esq., claimed that he paid \$48,690.96 in guardianship funds to pay a mortgage on the property, and requests that the guardianship be repaid.

The attorney for plaintiff, Grace Hemmings Gapihan, partially opposes the referee's motion, agreeing that defendant seeks to delay these proceedings while living in the premises

rent-free. Defendant caused plaintiff to incur costs to oppose the baseless motions brought. In the 2008 order and judgment of partition, it is noted, it is decreed that prior to the sale the referee "shall conduct a hearing * * * to determine whether or not the Plaintiff and the Defendant has accounted for the expenses paid for by each for the maintenance of the premises since titled devolved into the Plaintiff and Defendant after the joint Tenant David S. Hemmings became deceased." Defendant never complied with the demands of plaintiff and the referee to produce proof of payments from January 2004 "when he usurped control" of the premises, moving into the main apartment on the main floor previously occupied by his mother and brother. Plaintiff claims that the rent from the second floor apartment was \$1300 per month since before 2004. Defendant, it is alleged, collected this rent from 2004 through May 2009 and used it for his personal use, not for the upkeep of the property. Plaintiff claims that half of the rent collected since 2004 is due her.

From May 2009 to August 2011 the tenants were directed to deposit rent into an escrow account, wherein \$1300 for 28 months or \$36,400 was collected. Defendant presented two bills, apparently utility bills incurred by defendant as a result of his occupancy, (\$4373.64 and \$1845). These expenses should be chargeable solely to defendant, and should not be a chargeable claim to plaintiff. Accordingly, plaintiff requests that \$18,000 of the

money escrowed by the tenant be given to the plaintiff. Further, it is argued, the fees incurred by plaintiff to enforce the judgment of partition including the appeal to the Third Department to enforce the judgment should be charged solely to defendant. Plaintiff should not have to pay her own legal fees and then pay for the referee to act contrary to her interests. The referee is seeking fees based on "services disproportionately incurred because of the Defendant's activities" including "frivolous motion practice." Defendant delayed the auction for two years "by his specious efforts to have the property sold contrary to the Judgment" so that he alone should pay for costs related thereto."

In addition, it is alleged by plaintiff's attorney, there are certain mistakes in the referee's report: plaintiff paid \$19,781.05 for real estate taxes, but the referee credited her for only \$15,640.74; the referee omitted the water and sewer charges paid by plaintiff which should have been chargeable solely to defendant. Moreover, steps remain to be taken to obtain possession of the premises and to set reasonable use and occupancy for the period defendant remained in possession of the premises. It is further urged that the court reject defendant's claims as unsupported, incomprehensible and disingenuous.

In letter submissions, defendant opposes the claim by Mr. Lamberti for \$48,690.96. Defendant further seeks to be reimbursed for his maintenance of the property a total of

\$404,575. According to defendant, plaintiff abandoned the property eight years ago, and defendant had to “do all of the work, maintenance, upkeep, bills, and repairs on the home for the last 8 years as I have had to commute from California, my place of residence * * * to protect my investment.” The referee, plaintiff and Mr. Lamberti intend to make sure defendant gets as little of the sale as possible by “fraud, theft, falsification of the facts and exclusion of all my expenses.” Defendant requests that the referee be instructed to pay defendant the \$404,000 purportedly owed to him and that “the court mercifully grants me an extension because of the deception perpetrated on me, and additional 3 weeks to clear out the earthly material possessions of my deceased Father, deceased brother and my incapacitated mother, as my family has occupied the home for 35 years.”

In a further letter submission, defendant asserts that the mortgage paid by Mr. Lamberti was really a line of credit taken out by his deceased brother, David Hemmings. (Annexed is a statement for a home equity line of credit for David Hemmings and Carmen Hemmings of 399 Cornelia Street.) Defendant claims he had an offer for the property of \$515,000 and was therefore prejudiced when he was “blocked” from bringing this sale to the court. Defendant alleges that the rent for the tenant started at \$800, was raised to \$1000 in 2004, and was \$1300 only from February 2008. All utilities and repairs were paid for by the

rents. Defendant had to commute from California because plaintiff "was nowhere to be found" and defendant had to make sure there was heating, electricity, garbage removal, etc. He requests from the court no less than \$300,000 for his labor and expenses. According to defendant, rents totaled \$64,200 and expenses totaled \$52,423,95.

In a reply affirmation, the referee states that defendant represented he lived in California and was never asked to maintain the premises, and, therefore, he is not entitled to any management fees. Nor does he have any authority to make repairs after the auction sale, since plaintiff, not defendant, is the owner of the premises. The referee suggests that no money be paid to defendant until he vacates the premises.

In his final report, the referee aptly notes: "This has been the most litigious sale that I have encountered since the Plaintiff and Defendant agree on nothing." The referee further notes that defendant has had five different lawyers and has brought numerous motions. The matter is further complicated due to the fact that defendant is now proceeding pro se and submits unsworn letters instead of affidavits.

In the case at bar, prior to closing, plaintiff paid a total of \$19,781.05 for real estate taxes, \$3597.68 for Water Charges, \$6750 for a new roof, and \$1156.50 for Publishing Costs, and she should therefore be credited with half of those amounts, or \$9890.53 for taxes;

\$1798.84 for Water Charges; \$3375 for roof; and \$578.25 for Publishing Costs. Defendant should be debited for those same amounts. (The Water Charges should be shared, and not charged solely to defendant as plaintiff requests.) Similarly, the closing costs of \$4661.70 shall be divided between plaintiff and defendant.

Plaintiff's request for use and occupancy is denied. The distinguishing feature of a tenancy in common is the right of each cotenant to use the entire property as would a sole owner, whether or not they are in actual possession of the premises (*see Jemzura v Jemzura*, 36 NY2d 496 [1975]; *Marachuk v Marachuk*, 91 AD3d 1313 [4th Dept. 2012]; *Misk v Moss*, 41 AD3d 672 [2d Dept. 2007])[In a partition action, finding of the referee that a cotenant should pay the value of her use and occupancy of the subject real property was not substantially supported by the record; mere occupancy alone did not make cotenant liable for use and occupancy absent an agreement to that effect or an ouster of the plaintiff]). Here, too, there is insufficient support in the record to credit plaintiff with defendant's use and occupancy.

Plaintiff is to be credited with one-half the profits (total rents collected less expenses incurred) for the period from May 2009 until the sale in 2011. As the referee noted, plaintiff is entitled to an undivided right to the rents once she purchased it at the auction sale. For the

period before May 2009, neither party has submitted proof (to the referee or in this record) sufficient to conclude the amount, if any, of net profit from 2004 thru 2009.

The referee's request for fees is granted. \$10,000 shall be deducted from plaintiff's share and \$15,000 shall be deducted from defendant's share.

Repayment of the lien from Key Bank against the subject premises and paid by Anthony Lamberti as guardian of Carmen Hemmings is disallowed. At that time, Carmen Hemmings was not an owner of the premises nor was she obligated on the note.

Defendant's claims for management or any other fees have not been adequately demonstrated and are denied.

All other claims not provided for in the referee's report are denied.

No money is to be distributed to defendant until he leaves the subject premises.

Accordingly, the referee's motion to close this action and to terminate the reference is granted to the extent indicated herein. The foregoing constitutes the decision and order of this court.

ENTER FORTHWITH,

J. S. C.