

Agudosi v Berlin

2013 NY Slip Op 31383(U)

June 24, 2013

Supreme Court, Suffolk County

Docket Number: 07-14200

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 1-9-13 (#012)
MOTION DATE 1-16-13 (#013)
MOTION DATE 3-6-13 (#014)
MOTION DATE 2-27-13 (#015)
ADJ. DATE 3-6-13
Mot. Seq. # 012 - MotD # 014 - MG
013 - MG # 015 - XMotD

-----X
HESTER AGUDOSI and ANTHONY
HERRING,

Plaintiffs,

- against -

LESLI A. BERLIN, EVA MARIA RICCOBONI
and JENNIFER SCHEFFER, as executrices of
the estate of Milton Berlin, deceased, 84
LINCOLN LLC and ANNE LICURSI and
MAUREEN LICURSI, as trustees of the ANNE
LICURSI REVOCABLE TRUST,

Defendants.
-----X

PATRICK J. SULLIVAN, ESQ.
Attorney for Plaintiffs
92 Willis Avenue
Mineola, New York 11501

STIM & WARMUTH, P.C.
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290 Broadhollow Road, Suite 301
Melville, New York 11747

-----X
LESLI A. BERLIN, EVA MARIA RICCOBONI
and JENNIFER SCHEFFER, as executrices of
the estate of Milton Berlin, deceased,

Third-Party Plaintiff,

- against -

"JOHN DOE #1" TO "JOHN DOE #10"
inclusive, the last ten names being unknown to
the third-party plaintiff, the third-party defendants
last named in quotation marks being parties all of
whom claim some right or interest in the
premises as tenants or otherwise, said names
being fictitious, their true names being unknown
to the third-party plaintiff,

Third-Party Defendants.
-----X

JAKUBOWSKI, ROBERTSON, MAFFEI
GOLDSMITH & TARTAGLIA, LLP
Referee
969 Jericho Turnpike
St. James, New York 11780

Upon the following papers numbered 1 to 91 read on these motions for an order pursuant to CPLR 4403, to extend the notice of pendency and to approve Referee's fees and cross motion for an order pursuant to CPLR 4403; Notice of Motion/Order to Show Cause and supporting papers 1 - 21; 41 - 45; 66 - 79; Notice of Cross Motion and supporting papers 80 - 86; Answering Affidavits and supporting papers 22 - 38; 46 - 48; 49 - 61, 62 - 65; 87 - 89; Replying Affidavits and supporting papers 39 - 40; 90 - 91; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (012 and 014) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 4403 and an order pursuant to CPLR 6513 extending the duration of the notice of pendency, and the motion (013) by the Referee, Frank Maffei, Jr., Esq. for an order approving his fees are consolidated for the purposes of this determination and are decided together with the cross motion by plaintiffs for an order pursuant to CPLR 4403; and it is further

ORDERED that the motion (012) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 4403 confirming in part and rejecting and/or modifying in part the report dated November 19, 2012 of the Referee, Frank Maffei, Jr., Esq. and granting an interlocutory judgment is determined herein; and it is further

ORDERED that the motion (013) by the Referee, Frank Maffei, Jr., Esq. for an order approving his fees is granted; and it is further

ORDERED that the motion (014) by defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased, for an order pursuant to CPLR 6513 extending the duration of the notice of pendency regarding the subject property for an additional period of three years from the date of this order is granted; and it is further

ORDERED that the cross motion (015) by plaintiffs for an order pursuant to CPLR 4403 confirming in part and rejecting and/or modifying in part the report dated November 19, 2012 of the Referee, Frank Maffei, Jr., Esq. is determined herein.

This is an action for the partition of real property located at 84 Lincoln Avenue in Deer Park, New York pursuant to Real Property Actions and Proceedings Law (RPAPL) article 9 and for the reimbursement of expenses incurred with respect to said property. The subject property was purchased on September 1, 1972 by Caesar Herring and Frances Herring. They owned it as tenants by the entirety. By sheriff's deed dated August 24, 1988, Milton Berlin acquired the 50 percent interest of Frances Herring in the property. Thereafter, Milton Berlin and Caesar Herring each had a 50 percent ownership interest in the property as tenants in common. Then, by deed dated December 28, 1988, Milton Berlin transferred his interest in the property to himself and Ralph Licursi as tenants in common. Based on a Certificate of Title of the Suffolk County Registrar dated January 23, 1989, the subject property is a registered property under Article 12 of the Real Property Law, and on said date Caesar Herring had a 50 percent interest, Milton Berlin had a 25 percent interest and Ralph Licursi had a 25 percent interest in the subject property as tenants in common. Ralph Licursi died in 1995, Caesar and Frances Herring divorced in May 1995, Caesar Herring died intestate in August 2001, and Milton Berlin died in 2009.

The defendants and the third-party plaintiffs in this action claim to have received Frances Herring's interest in the subject property through various deeds and the plaintiffs claim interest in the property as distributees and heirs at law of Caesar Herring. The parties are in agreement that the plaintiffs have a 50 percent interest, the Berlin heirs have a 25 percent interest, and the Licursi heirs have

a 25 percent interest in the subject property. The Court's computerized records indicate that the note of issue in this action was filed on July 27, 2011.

The prior order of this Court dated January 6, 2012 (Jones, J.) granted that portion of the motion of the defendants/third-party plaintiffs Lesli A. Berlin, Eva Maria Riccoboni and Jennifer Scheffer, as executrices of the Estate of Milton Berlin, deceased (Berlin heirs) for an order appointing a referee pursuant to RPAPL §§ 911 and 913. Said prior order appointed Frank Maffei, Jr., Esq. as Referee to ascertain and report as to the rights, shares and interests of the parties in the real property located at 84 Lincoln Avenue in Deer Park, New York and to perform an accounting. The Referee conducted a hearing on July 12, 2012 during which plaintiff Hester Agudosi, defendant Lesli Berlin and non-party witness Frances Herring all testified. Defendant Maureen Licursi, as trustee of the Ann Licursi Revocable Trust was notified by her counsel but did not appear at said hearing.

In his Findings of the Referee to Compute dated November 19, 2012, the Referee found that the plaintiffs, the children of Frances and Caesar Herring, who commenced this action in their individual capacity as compared to the capacity of an estate representative, are entitled to assert claims for credit or reimbursement of paid expenses starting from the date that their individual interests in the property as heirs of Caesar Herring manifested themselves, August 21, 2001, the date of Caesar Herring's death. The Referee determined that plaintiffs were entitled to be credited payments made from August 21, 2001 onward by their mother, Frances Herring, for property taxes, mortgage principal and interest, homeowner's insurance and for an alarm system inasmuch as the payments were a benefit to the property and Ms. Herring established through clear and credible testimony that she made all payments to benefit her children. In addition, the Referee rejected defendants' arguments as unsupported by any evidence that an express or implied ouster occurred rendering defendants free from responsibility for expenses incurred by the tenant in common who occupied the premises and entitling them to an apportionment of rents, which he found were never collected nor was there an agreement to that effect.

The Referee also found that plaintiff Hester Agudosi established that all expenses claimed, for real estate taxes, mortgage interest and principal, homeowner's insurance and an alarm system, were reasonable expenses to meet plaintiffs' burden of preserving the property from waste and injury. The Referee determined that the total sums paid for taxes from 2001 to the second half of 2009 were \$94,520.66, that each defendant is responsible for 25 percent of said sum at the time of sale of the property, such that plaintiff is entitled to a credit of \$23,630.19 from each defendant entity for a total of \$47,260.33. In addition, he determined that plaintiff is entitled to a 50 percent credit of tax payments made from the second half of 2009 through 2011 in the sum of \$29,848.39, such that defendants' 50 percent contribution would be \$14,924.95 with each defendant being responsible for \$7,462.09. With respect to mortgage principal payments, the Referee found that payments made from August 1, 2001 continuing to plaintiff's last payment on July 24, 2008 resulted in a principal reduction from \$20,699.23 to \$14,591.58 for a total principal reduction of \$6,107.65. He determined that defendant entities are responsible for 50 percent of said total or \$3,053.85 with each defendant being responsible for \$1,526.92. Regarding mortgage interest payments, the Referee found that said payments were made from August 1, 2001 up to and including July 24, 2008 totaling \$8,679.57, and that defendant entities are responsible for 50 percent, \$4,339.14, or \$2,169.90 each and that plaintiff is entitled to a credit for said amounts. As for the homeowners insurance, the Referee found that plaintiff and/or Ms. Herring had made payments from April 1, 2004 up to and including August 22, 2011 to total \$8,963.96 and determined that defendant entities are collectively responsible for 50 percent of said amount equaling \$4,481.98 in total or 25 percent each in the amount of \$2,240.99 and that plaintiff is entitled to a credit for said amounts. Finally, with respect to the alarm system, the Referee found that payments were made

from July 2008 to January 2012 in the total amount of \$2,438.00, that each defendant entity is responsible for 25 percent, such that plaintiff is entitled to a credit of \$609.50 from each defendant entity. The Referee added that the percentage of responsibility for the aforementioned payments continue up to and including the time of sale of the property.

The Berlin heirs now move for an order confirming in part and rejecting and/or modifying in part the Referee's report. They assert that the Referee's computations for the amounts awarded for taxes paid from August 21, 2001 to the first half of 2009 are incorrect. In addition, the Berlin heirs challenge the Referee's finding that there was no ouster by asserting that upon purchase of Ms. Herring's portion of the property at the Sheriff's sale, Mr. Berlin could not occupy the property where Ms. Herring, her husband, and their family continued to reside, such that Mr. Berlin was impliedly ousted from the property at the moment of purchase and therefore he was not responsible for paying the costs of maintaining the property. They also challenge the Referee's finding that plaintiffs are entitled to recover monies that their mother paid, arguing that plaintiffs' mother paid said expenses because she enjoyed the use and occupancy of the premises and that plaintiffs were not required or expected to reimburse their mother's expenses. The Berlin heirs further challenge the Referee's finding that defendants are obligated to reimburse mortgage payments made by plaintiffs' parents on a loan or debt that defendants were not obligors and never agreed to be personally liable to repay. The Berlin heirs add that they and plaintiffs each paid \$459.05 constituting half of the hearing transcript expenses under protest and that they are each entitled to a credit from the Licursi heirs, who did not appear at the hearing, in the sum of \$153.02 for their share of the cost. In support of their motion, the Berlin heirs submit the pleadings, the prior order of this Court dated January 6, 2012, the transcript of the hearing held before the Referee on July 12, 2012, copies of the exhibits submitted at the hearing, and the Referee's report.

The Licursi heirs contend in opposition to the motion of the Berlin defendants that the Referee's findings should be rejected to the extent that they seek to impose any liability on the Licursi heirs inasmuch as the Licursi heirs have settled the property expenses and property expense claims with plaintiffs pursuant to a partial stipulation of settlement dated February 16, 2013. They argue that said settlement is intended to supercede the Referee's findings, and that they should not be held responsible for any portion of the Referee's fees inasmuch as the Licursi heirs gave notice prior to the hearing that they were in the process of settling with plaintiffs, they did not make any pre-hearing or post-hearing evidentiary submissions, and they did not request the appointment of a referee. Their submissions in support of their opposition include a copy of the stipulation acknowledging settlement dated February 20, 2013 executed by the attorneys for plaintiffs and the Licursi heirs indicating that the settlement agreement's contents are strictly confidential and that the settlement agreement is intended to supercede the Referee's findings.

In reply, the Berlin heirs argue that the Licursi heirs are obligated to pay their proportionate share of the Referee's fees because at the time of the hearing the Licursi heirs had not yet settled and the settlement agreement did not exist.

Plaintiffs cross-move for an order confirming in part and rejecting and/or modifying in part the Referee's report. Plaintiffs seek confirmation of the report in every aspect except for the determination that plaintiffs are unable to recover contributions from the Berlin heirs for expenditures made on the premises prior to August 2001. In opposition to the cross motion, the Berlin heirs argue that the Referee was correct in determining that plaintiffs are not entitled to recover monies paid before they took title to the property and reassert that the Berlin heirs should not have to pay Frances Herring's mortgage or pay plaintiffs for monies paid by their mother, that there was an implied ouster, and that the expenses of the

Referee should be shared equally by the parties.

One who holds an interest in real property as a tenant-in-common may maintain an action for partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners (*see* RPAPL 901[1]; *Piccirillo v Friedman*, 244 AD2d 469, 664 NYS2d 104 [2d Dept 1997]; *Bufogle v Greek*, 152 AD2d 527, 543 NYS2d 152 [2d Dept 1989]). “Partition, although statutory (RPAPL 9), is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale” (*Freigang v Freigang*, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (*see Worthing v Cossar*, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). These include acquisition payments, such as down payments and mortgage payments (*see Quattrone v Quattrone*, 210 AD2d 306, 307, 619 NYS2d 773 [2d Dept 1994]; *Vleck v Vleck*, 42 AD2d 308, 311, 346 NYS2d 893 [3d Dept 1973]; *see also Brady v Varrone*, 65 AD3d 600, 602, 884 NYS2d 175 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property, if they were made in good faith and are of substantial benefit to the premises (*see Vleck v Vleck*, 42 AD2d 308, 311, 346 NYS2d 893). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see McIntosh v McIntosh*, 58 AD3d 814, 872 NYS2d 490 [2d Dept 2009]; *Misk v Moss*, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]).

“The decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court” (*see* CPLR 4319). The Court may confirm or reject the referee’s report, in whole or in part, and make new findings (*see* CPLR 4403; *Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 [2d Dept 2000]). The report and recommendations of a referee should be confirmed if the findings are supported by the record (*see MacNiallias v Potter*, 82 AD3d 718, 917 NYS2d 895 [2d Dept 2011]; *Ferentini v Ferentini*, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]; *Capili v Ilagan*, 26 AD3d 354, 810 NYS2d 480 [2d Dept 2006]).

The circumstances of the subject action are quite similar to those of *Gralicer v Johnstone*, 144 AD2d 436, 534 NYS2d 15 (2d Dept 1988) wherein the Appellate Division, Second Department held that there was no evidence on the record that the purchaser at a sheriff’s auction of the owners/occupants’ interest in the property was ousted by the occupants after the purchase, and that the occupants’ mere continued occupation of the house did not constitute an ouster (*see Gralicer v Johnstone*, 144 AD2d 436, 534 NYS2d 15 [2d Dept 1988]). Thus, the Referee correctly determined that Milton Berlin and Ralph Licursi were not ousted upon their purchase of Frances Herring’s 50 percent interest in the property and that the Berlin heirs and Licursi heirs are not entitled to receive rent payments from the time of purchase (*see id.*). Therefore, the Referee’s findings concerning a lack of ouster are confirmed.

However, the Referee was incorrect in crediting plaintiffs with payments made solely by their mother, Frances Herring, on the property. Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant in a partition action (*see Worthing v Cossar*, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). Their mother, Frances Herring, is not a party to this action and plaintiffs did not commence this partition action in their capacity as the heirs of their mother’s estate. Thus, plaintiffs have no standing to seek the recovery of payments that were never made by them (*see Sharrow v Sheridan*, 91 AD3d 940, 937 NYS2d 320 [2d Dept 2012], *lv denied* 19 NY3d 802, 946 NYS2d 104 [2012]). Plaintiffs may only recover payments they personally made on the property in excess of their obligations as against the Berlin heirs and Licursi heirs. The Court notes that plaintiff Anthony Herring did not appear at the hearing and there is no mention of his having made any

payments with respect to the property. Paragraph 14 of the Referee's report indicates that the Referee found credible plaintiff Agudosi's testimony at the hearing regarding mortgage and property tax payments that she personally made during an approximate one-year period in the approximate total amount of \$12,000 and that the documents submitted at the hearing supported said testimony. Paragraph 38 of said report indicates that the Referee found that the evidence established that payments were made by plaintiff Agudosi and/or her mother for homeowners insurance from April 1, 2004 up to and including August 22, 2011 totaling \$8,963.96. However, the hearing transcript reveals that plaintiff Agudosi did not produce any evidence of the checks that she purportedly wrote for mortgage payments, a portion of which payments were purportedly used to pay property taxes, either during discovery or during the hearing and she could not recall the specific dates or amounts of said payments (*see* Hearing Tr. at 36-38). Therefore, the Referee's findings in paragraph 14 and paragraph 38 as pertains to plaintiff Agudosi are rejected as unsupported by the record. In addition, there is no indication in the Referee's report and no hearing testimony that plaintiff Agudosi made any payments for the homeowners insurance or the alarm system (*see* Hearing Tr. at 36, 38, 71). Plaintiff Agudosi testified at the hearing that there was nothing in Plaintiffs' exhibits 2 or 3 that reflected a payment made by her (*see* Hearing Tr. at 84, lines 13-18). Plaintiff Agudosi also testified at the hearing "My mother made payments towards the mortgage, towards the insurance, toward repairs, and toward the security system. And it is my intent upon the sale of this house to take whatever proceeds come out of it to reimburse her." (*see* Hearing Tr. at 80, lines 22-25; at 81, lines 1-3). There is no evidence of any agreement for reimbursement between plaintiffs and their mother (*see* Hearing Tr. at 81-82, 117). It so follows that plaintiffs are not entitled to any credits for any payments made for property taxes, mortgage principal and interest, homeowner's insurance and for an alarm system on the subject property as they failed to demonstrate at the hearing that they personally made payments for said expenses. Therefore, the Court rejects those portions of the Referee's report, paragraphs 34 through 39, crediting plaintiffs with said payments. Based on the foregoing, the Referee's finding that plaintiffs' claims may not predate the date that they obtained a legal interest in the property, August 21, 2001, is correct and is confirmed.

The Berlin heirs also request an interlocutory judgment determining 1) that the property is so circumstanced that a partition cannot be made without great prejudice to the owners; 2) that plaintiffs and defendants own undivided interests in the premises as tenants in common; 3) that the property be sold at public auction; and 4) that the proceeds of the sale be distributed between the parties as provided by this Court. Prior to the rendering of an interlocutory judgment for the sale of real property, the Court must ascertain whether "there is any creditor not a party who has a lien on the undivided share or interest of any party" (*see* RPAPL 913 [1]). Therefore, that portion of the motion by the Berlin heirs is denied with leave to renew upon proper proof in the form of "[a] search certified by the clerk or by the clerk and register of the county where the property is situated that there is no such outstanding lien" (*see id.*). Said motion to renew is to be accompanied by a copy of this order.

The Berlin heirs further move for an order pursuant to CPLR 6513 extending the duration of the notice of pendency for an additional period of three years from the date of this order. Their submissions in support of the request include a proposed order extending the duration of the notice of pendency. No opposition to this motion has been submitted.

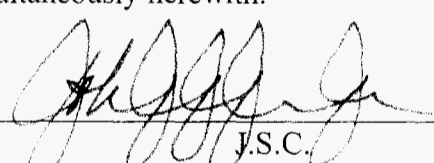
The emergency order to show cause of the Berlin heirs was brought before the expiration of the existing notice of pendency and provided for the continuation of the notice of pendency pending the further order of the Court. Thus, the request is timely. In addition, the Berlin heirs made a showing of good cause for the extension (*see* CPLR 6513). Therefore, the motion to extend the duration of the notice of pendency for three additional years from the date of this order is granted.

The Referee moves for an order approving his fees in the sum of \$5,622.50 and submits an invoice of services rendered as well as a proposed order. The Berlin heirs do not challenge the amount of the Referee's fees but rather the failure of the proposed order to indicate the apportionment of the fees among the parties. The Berlin heirs submit a counter-proposed order indicating that plaintiffs, the Berlin heirs and the Licursi heirs are to each pay one-third of the Referee's fee. The Licursi heirs also do not challenge the Referee's work or fee amount but oppose the motion to the extent that they are required to pay any portion of the requested fees. They argue that they notified the Referee by telephone and e-mail, prior to the hearing, that the Licursi heirs and plaintiffs intended to resolve the issues of property expense allocation and reimbursement on their own through settlement, and did not participate in the hearing or provide any pre-hearing or post-hearing submissions to be reviewed by the Referee, such that they are not liable for any portion of the Referee's fees. They admit that settlement negotiations were continuing and not finalized at the completion of the Referee's hearing. The Berlin heirs contend that the assertions of the Licursi heirs lack merit inasmuch as they had no finalized settlement with plaintiffs during and at the completion of the hearing and note that the Licursi heirs failed to submit any opposition to their prior motion to appoint a referee and thus waived their right to complain about the Referee's fee.

Here, the Licursi heirs have failed to demonstrate that they are not liable for the Referee's fees. Notably, the Licursi heirs did not submit any opposition to the prior motion requesting the appointment of a referee and were subsequently bound by the order appointing a referee to compute and directing that the referee be paid his fees for his services. In addition, although the Licursi heirs intentionally defaulted at the hearing purportedly due to ongoing settlement negotiations with only the plaintiffs, the e-mails they submitted indicate that their attorney did not request an adjournment of the Referee's hearing pending completion of said settlement negotiations and the e-mails from plaintiffs' attorney to the Referee made no mention of any such settlement negotiations (*see generally Salisbury v Binghamton Pub. Co.*, 85 Hun 99, 66 NY St Rep 35, 32 NYS 652 [NY Sup Gen Term Feb 1895]; *Trieste Group LLC v Ark Fifth Ave. Corp.*, 21 Misc 3d 1142 (A), 880 NYS2d 227 [Sup Ct, New York County, 2006]). Based on the foregoing, the Court determines that the Licursi heirs are required to pay their proportionate share of the Referee's fees. The equal apportionment of the Referee's fee, despite the parties' unequal shares in the subject property, has been held to be a proper exercise of the court's discretion, given that none of the parties has prevailed completely (*see CPLR 8103, 4321; RPAPL 981 [3]; H & Y Realty Co. v Baron*, 193 AD2d 429, 597 NYS2d 343 [1st Dept 1993]). Thus, the Court grants the request of the Referee for an order approving his fees in the sum of \$5,622.50, and directs that plaintiffs, the Berlin heirs and the Licursi heirs are to each pay one-third of said sum to the Referee. In addition, the Berlin heirs and plaintiffs are each entitled to a credit from the Licursi heirs in the sum of \$153.02 for their share of the cost of the hearing transcript.

The proposed orders extending the duration of the notice of pendency and approving the Referee's fees, as modified by the Court, are signed simultaneously herewith.

Dated: 24 June 2013



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION