

Gapihan v Hemmings
2013 NY Slip Op 33844(U)
August 1, 2013
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 1st day of August, 2013.

P R E S E N T:

HON. LAWRENCE S. KNIPEL,

Justice.

-----X

GRACE HEMMINGS GAPIHAN,

Plaintiff,

- against -

Index No. 39036/05

THOMAS HEMMINGS AND ANTHONY LAMBERTI;
UNITED STATES OF AMERICA; THE CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD; AND
THE CITY OF NEW YORK PARKING BUREAU AND
KEY BANK OF NEW YORK,

Defendants.

-----X

The following papers numbered 1 to 8 read herein:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed_____

Opposing Affidavits (Affirmations)_____

Reply Affidavits (Affirmations)_____

_____ Affidavit (Affirmation)_____

Other Papers_____

Papers Numbered

1-3, 4-6

7, 8

As more fully detailed in an earlier decision of the Appellate Division, Third Department (*Gapihan v Hemmings*, 80 AD3d 1138 [3d Dept 2011]) and this court's prior

decisions and orders, this has been an especially contentious partition action relating to a premises located in Brooklyn that was formerly owned by plaintiff Grace Hemmings Gapihan and defendant Thomas Hemmings as tenants in common.

As noted in the May 22, 2012 decision and order, plaintiff was 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. After the sale, plaintiff is entitled to an undivided right to the rents once she purchased the property at the auction sale. Neither side submitted proof to determine the amount of net profit from 2004 to 2009, if any. In addition, defendant's claims for management or other fees were denied.

After submission of the motion to close the reference, but prior to the issuance of the May 22, 2012 order, Gapihan moved by way of an order to show cause dated May 18, 2012, for, among other things, an order: (1) compelling Hemmings to vacate the premises pursuant to the court's judgment and pursuant to the referee's deed delivered to plaintiff on September 9, 2011; (2) issuing an order of possession and writ of ejectment; (3) authorizing the sheriff to remove Hemmings in the event he fails to comply with the order of possession and writ of ejectment; and (4) finding that Hemmings owes use and occupancy for remaining in possession after the issuance of the judgment of partition until the time he vacates the premises to be deducted from his share of the sale proceeds. Gapihan sought use and occupancy from Hemmings based on his failure to vacate the premises as required by the judgment of partition and Gapihan's receipt of the referee's deed, and the recovery of

attorneys fees and costs and expenses relating to the proceeding to remove Hemmings and to obtain use and occupancy from him.

By order dated June 7, 2012, the court granted the motion to the extent that “a hearing be held before the Special Referees at the JHO part to determine the issues raised in the order to show cause.” An accompanying order provided that the reference was to Hear and Report with respect to the issues of “Defendant’s vacating the subject remises and the amount of use and occupancy for Defendant’s failure to surrender the property pursuant to the judgment of Partition and Sale.” The court, in an order dated June 7, 2012, granted Gapihan’s motion to the extent of directing that the issues raised by the order to show cause be determined in a hearing to be held by a special referee in the JHO part.

In the instant motions, defendant moves for an order: (1) granting him statutory interest on his share of the proceeds of the partition sale from the date that plaintiff became the owner of the property; (2) dismissing Gapihan’s current claims; and (3) sanctioning Gapihan for frivolous conduct by the awarding of reasonable attorney fees and court costs.¹ Plaintiff Grace Hemmings Gapihan cross moves for an order: (1) granting leave to add a claim against defendant for unjust enrichment pursuant to RPAPL 1201 assessing damages against Hemmings based on his waste of the property; (2) referring the matter back to the referee or making a new reference to the JHO Part in order to determine issues not previously

¹ Although Hemmings has improperly denominated his motion a “cross-motion,” the court has disregarded this technical defect because Gapihan has had an ample opportunity to respond to the motion on the merits (*see Daramboulakas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; CPLR 2001]).

heard by the referee, including the ouster of Gapihan from the premises; and (3) pursuant to 22 NYCRR 130-1.1 and 130-1.2, awarding costs and attorneys fees against Hemmings for making frivolous post-judgment motions and entering judgment upon such an award of costs and attorneys fees.

The portion of Hemmings' motion in which he seeks dismissal of plaintiff's claims is deemed a motion to limit the scope of relief at the hearing before the special referee directed by this court in the June 7, 2012 order. Contrary to Hemmings' contention, the court's May 22, 2012 decision did not address any issue relating to his remaining on the premises in contravention of the judgment of partition and/or Gapihan's rights once she received the referee's deed. Neither the court nor the referee has made any findings regarding where Hemmings has been residing. Although, as noted by Hemmings, the language in the September 17, 2008 order and judgment of partition provided that the plaintiff and defendant could remain in possession until the delivery of the title to the purchaser, Gapihan may be entitled to use and occupancy before delivery of the referee's deed to her, depending on whether Hemmings ousted her from the premises. Gapihan is undoubtedly entitled to use and occupancy for any time Hemmings occupied the premises after the delivery of that deed (*see Cheney v Woodruff*, 45 NY 98, 101 [1871]; 79 NY Jur 2d, Mortgages § 765; *cf. Federal Natl. Mtge. Assn. v Nittoli*, 250 AD2d 427, 427 [1st Dept 1998]; *Ainslie v Hicks*, 13 App Div 388, 390 [1st Dept 1897])[purchaser at partition sale has right to possession of premises on the delivery of the referee's deed], *affd on the opinion below* 153

NY 643 [1897]). As such, in addition to the issues of ouster and rent from tenants, the factual issues to be addressed at the hearing are whether Hemmings occupied the premises after the delivery of the deed, the length of any such occupation,² and the reasonable value of any such use and occupancy. The referee may also explore whether there was any waste at the premises due to defendant's occupancy thereof, and if so, what damages were caused thereby. In this regard, however, it is noted that any claim for waste would be limited to structural damage, and would not extend to normal wear and tear (RPAPL 817, 1201; 24 NY Jur 2d, Cotenancy § 66; 107 NY Jur 2d, Waste § 6; *cf. Staropoli v Staropoli*, 180 AD2d 727, 727-728 [2d Dept 1992][mere failure to repaint exterior does not constitute waste absent structural damage]).

With respect to Hemmings' request for "statutory interest" on his portion of the sale proceeds, he has failed to identify any basis for this relief (*see Wong v Eng*, 1998 WL 996734 * 4 [U] [Sup Ct, New York County 1998]). In this regard, the court notes that the sale proceeds are not being held as the result of a judgment or order "awarding" or "directing" the payment of a sum of money for purposes of CPLR 5002 and 5003 (*see First Natl. Bank of Md. v Fancy*, 268 AD2d 229, 229 [2000]). Hemmings request for statutory interest is thus denied.

The remaining portions of the motions, including Gapihan and Hemmings' requests for sanctions, costs and attorney's fees, are denied.

² In his affirmation in support Gapihan's current cross motion, Gapihan's counsel concedes that Hemmings vacated the premises 10 months after delivery of title to Gapihan.

Accordingly, the hearing before the special referee should address, *inter alia*, the issues of whether Hemmings ousted Gapihan from the joint tenancy, and if so, the reasonable use and occupancy resulting therefrom; whether the parties are entitled to any credits or debits with respect to rent received by either party from tenants during the co-tenancy prior to the creation of the escrow account; whether defendant was still in occupancy after the sale was completed, and, if so, for what period of time and how much use and occupancy is due to plaintiff; and whether there was any waste committed by defendant, and if so, what the damages are resulting therefrom.

This constitutes the decision and order of the court.

ENTER,
J. S. C.
HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE

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