

Bonanno v Flanagan

2014 NY Slip Op 32937(U)

November 14, 2014

Supreme Court, Suffolk County

Docket Number: 7489/05

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY



PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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MARIA PHILIPS BONANNO and CHRISTINE V.
PHILIPS,

Plaintiffs,

-against-

JOHN P. FLANAGAN, ERIN FLANAGAN
LAZARD, VICTORIA E. PHILIPS, 395 PL REALTY
and JAMES PHILIPS,

Defendants.

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INDEX NO.: 7489/05

CALENDAR NO.: 200800070EQ

NON-JURY TRIAL DECISION

PLAINTIFFS' ATTORNEY:

ESSEKS, HEFTER & ANGEL, LLP
108 East Main Street, P.O. Box 279
Riverhead, New York 11901

DEFENDANTS' ATTORNEYS:

CIARELLI & DEMPSEY, P.C.
737 Roanoke Avenue
Riverhead, New York 11901

MICHAEL T. CORNACCHIA, ESQ.

260 Madison Ave., 22nd Floor
New York, New York 10016

Plaintiffs' action seeks remedies in the form of specific performance of a contract entered into by all parties to privately sell residential premises or, in the alternative, a judicial partition of those premises to be sold at public auction together with an award for money damages. The premises have been the primary residence of the defendant James Philips since 1984. The plaintiffs are the daughters of James Philips; the co-defendants are a third daughter of James Philips from a subsequent marriage with Helen Downey (Victoria E. Philips) and Helen Downey's two children from her prior marriage (John P. Flanagan & Erin Flanagan Lazard).

By deed dated January 29, 1962 defendant James Philips (J. Philips) purchased the 12.03 acre parcel in East Hampton, New York, which is the subject matter of this action. The premises have been improved with a residential dwelling and a swimming pool.

Defendant J. Philips conveyed title to the parcel to his then wife, Patricia Philips (P. Philips), in 1963. Plaintiffs Maria Philips Bonanno (M. Bonanno) and Christine V. Philips (C. Philips) are the daughters of J. Philips and P. Philips. P. Philips died in 1965. By Decree of the New York County Surrogate's Court dated May 1, 1965 title to the premises was divided into equal one-third shares to plaintiffs and their father, defendant J. Philips. Defendant J. Philips married Helen Downey (Downey) on December 10, 1970 and conveyed his one-third interest in the premises to Downey in September, 1971. Defendant Victoria Philips (V. Philips) was born in 1975 and is the daughter borne of the J. Philips/Downey marriage. Defendant J. Philips and Downey divorced in 1984. In August, 1972 Downey conveyed her interest in the premises to her own children from a prior marriage (defendants John P. Flanagan (J. Flanagan) & Erin Flanagan Lazard) and thereafter a series of conveyances resulted in Downey re-acquiring a one-ninth interest from January, 1981 until May, 1997. Defendant J. Philips re-acquired a one percent interest from February, 2000 until August, 2002. The parties have stipulated that ownership of the parcel at the time of trial was vested

as follows: a) one-third interest in plaintiff C. Philips; b) one-third interest in plaintiff M. Bonanno; c) one-ninth interest in defendant V. Philips; and d) two-ninths interest in defendant 395 PL Realty, Inc.

Plaintiffs claim that as a result of parental abuse they were forced to leave the premises and to reside elsewhere. Plaintiff C. Philips claims that she was thrown out of the residence when she was 15 or 16 years old and never returned. Plaintiff M. Philips claims she last resided in the premises at age 18 when she graduated from high school, but did spend additional summers there.

The premises were twice the subject of a tax sale to Suffolk County as a result of the owners' failure to pay real property taxes. The County obtained title by tax deed dated September 5, 2001. By County Resolution approved on November 25, 2002, Suffolk County permitted conveyance of the premises to plaintiffs (each obtaining a 1/3rd interest) and to defendants V. Philips, J. Flanagan and E. Flanagan (each obtaining a 1/9th interest) on condition of payment to the County in the sum of \$104,085.72 representing full payment for back taxes, penalties and interest.

In order to comply with the County's Resolution, all parties entered into an agreement dated April 30, 2003 which set forth the method for financing payment to the County to redeem the premises together with provisions related to payment for other outstanding loans and indebtedness related to the property; the deposit of monies to be held in escrow for house maintenance and repayment of the loan obtained to finance the agreement; future summer rental of the premises; defendant J. Philips' rights to the use of the property; the listing of the property for sale; and the escrow agent's duties and responsibilities. Pursuant to the terms of the agreement financing was obtained by defendant V. Philips' execution of a promissory note and all parties execution of a mortgage in the sum of \$300,000.00 in favor of Emigrant Savings Bank. Upon payment to the County (as set forth in the November 25, 2002 Resolution) of all sums due and owing to the municipality, title to the premises was conveyed to the parties by deed dated April 25, 2003 and recorded in the County Clerk's Office on May 30, 2003.

Home repairs and maintenance were performed on the premises and paid from the house maintenance account from July, 2003 through May, 2005. However, the premises were never rented for the summers during this period. Plaintiffs commenced this action by filing a complaint on March 22, 2005 claiming that the defendants breached the April 30, 2003 agreement by failing to list and show the premises for summer rental. Plaintiffs' complaint sets forth three causes of action seeking a partition pursuant to Article 9 of the Real Property Actions & Proceedings Law (first cause of action), seeking specific performance of the April 30, 2003 agreement (second cause of action), and seeking money damages based upon the defendants' breach of the agreement in failing to make a good faith effort to rent the premises for the summers of 2003 and 2004 (third cause of action).

Plaintiffs claim that they are entitled to end the co-ownership of the premises and are entitled as a matter of right to a partition to alienate their 2/3rd fee ownership interest. Plaintiffs assert that any form of physical partition, particularly the form advocated by the defendants, would cause great prejudice to the owners since: 1) there are four owners and the property cannot be divided into four lots to comply with the zoning ordinance; 2) any proposed subdivision would have to be approved by the town planning board which could result in the plaintiffs obtaining an illegal, non-buildable lot; 3) any subdivision approval would be costly and time-consuming with no guarantee of ultimate

approval; and 4) judicial partition requires equalization of the value of each parcel in accordance with the individual's ownership interests. Plaintiffs also claim that the preponderance of evidence shows that defendants breached the April 30, 2003 agreement by failing to rent the premises and therefore plaintiffs are entitled to sell the premises as required under the terms of the parties' agreement. Plaintiffs claim that they performed all duties required under the agreement and that defendants failure to rent the property justified commencement of this action two months before the May, 2005 contractual deadline. Plaintiffs assert that the parties agreement sets forth the terms for selling the premises including a formula for establishing the sales price (the average of three real-estate appraisals) and conducting the sale by listing with brokers rather than by public auction. Plaintiffs also assert that the proof together with the documentary evidence establishes that defendant J. Philips retains no life estate in the premises and therefore has no right to continue to reside there. Finally plaintiffs claim that the proceeds of the sale should be distributed to the parties according to their ownership interests with certain set-offs which include reimbursement for mortgage payments made by plaintiffs since the defendants 2005 breach and which would not include any credit to reimburse defendants for prior payment of real estate taxes since the parties previously agreed that defendant J. Philips was responsible for such payments while he resided in the premises and since the undisputed evidence showed that the plaintiffs were unjustifiably ousted from the premises in 1978 (plaintiff C. Philips) and in 1995 (plaintiff M. Philips).

Defendants claim that the April 30, 2003 agreement must be interpreted as an agreement not to partition the premises since it specifically provided that a sale could only proceed after May, 2005. Defendants also claim that the plaintiffs lacked standing to maintain a partition action since they failed to prove that they had actual or constructive possession of the premises. Defendants assert that the Court should declare that defendant J. Philips holds a life estate in the premises and that no partition action can therefore be successful. Defendants argue that plaintiffs are not entitled to specific performance of the agreement and that the defendants are entitled to damages based upon the plaintiffs' breach of the agreement. Defendants maintain that should the Court determine that a judicial partition is the proper legal remedy to resolve the issues in dispute that the preponderance of the evidence presented at trial favors a physical partition of the premises in accordance with the "Hemmer Map" subdividing the premises into two more than five acre lots. Defendants claim that the physical partition of the premises dividing the parcel into two lots could be done without prejudice to the parties and would afford defendant J. Philips the right to continue to reside in the dwelling where he has lived for the past 40+ years. It is the defendants' position that the accounting, which is a necessary incident of a partition, reveals that defendant J. Philips is entitled to be reimbursed for making tax payments since 1962 or, in the alternative, since 1983 when both plaintiffs had reached the age of 21. Defendants contend that there was no relevant proof submitted at trial to prove that either plaintiff was ousted from the premises or to show that defendant J. Philips and Helen Downey owned the premises as tenants-in-common when the alleged ouster occurred. Finally defendants claim that the plaintiffs breached the parties agreement by failing to list the premises for rent and by failing to cooperate with the defendants to maintain and improve the premises as required under the terms of the agreement.

A non-jury trial of the action was conducted on August 4, 2010; August 24, 2010; September 28, 2010; October 25, 2010 and November 10, 2010. Nine individuals testified at trial. They were: plaintiffs C. Philips and M. Philips, David Weaver (a licensed surveyor called on behalf of the plaintiffs), Teresa Quigley (escrow agent & attorney who represented defendant J. Philips with

respect to the April 30, 2003 agreement), John Bonanno (plaintiff Maria Philips Bonanno's husband), John Berman (East Hampton real estate sales associate), Richard Whalen (private attorney specializing in land use and zoning), F. Michael Hemmer (a licensed surveyor called on behalf of the defendants) and Helen Downey. After concluding the trial counsel for the parties submitted post-trial memorandums of law and decision was reserved.

The elements that must be alleged and proven at trial to sustain a viable breach of contract claim are: 1) formation of a contract between plaintiffs and defendants; 2) performance by the plaintiffs; 3) defendants' failure to perform; and 4) resulting damages proximately caused by the defendants' breach (*Renaissance Equity Holdings v. Al-An Elevator Maintenance*, 993 NYS2d 563, 2014 NY Slip Op. 06570 (2nd Dept., 2014)). The second and third causes of action set forth in the plaintiffs' complaint allege that defendants breached the April 30, 2003 agreement as a result of the defendants' unjustified failure to list, show and rent the premises during the summers of 2003 and 2004 and they are therefore entitled to specific performance to sell the premises by private sale and/or money damages. The counterclaim set forth in the defendants' answer alleges a breach of the same contract by plaintiff Maria Bonanno, alleging that she unjustifiably failed to perform her obligations under the terms of the agreement with respect to payment for maintenance work and seeks money damages.

Neither the plaintiffs, nor the defendants, proved by a preponderance of the evidence at trial, that they are entitled to damages based upon breach of the April 30, 2003 agreement. The relevant, credible evidence at trial failed to establish that the defendants did not comply with their obligations under the terms of the agreement by failing to list, show and rent the premises for the summers of 2003 and 2004. Nor did the relevant, credible evidence at trial show by a preponderance of the proof that the plaintiff Maria Bonanno did not comply with her obligations under the terms of the agreement with respect to the house maintenance funds account. Accordingly neither party is entitled to money damages based upon the breach of contract claims and plaintiffs did not establish their right to specific performance of the contract which would require a private sale of the premises.

Real Property Actions & Proceedings Law 901 provides:

1. A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.

While the statute confers on a tenant in common the right to maintain an action for partition, it is not accurate to say that partition is an absolute right. (*see 2 Tiffany, Law of Real Property* (3rd Edition), Section 474)). The remedy has always been subject to the equities between the parties (*see Graffeo v. Paciello*, 46 AD3d 613, 848 NYS2d 264 (2nd Dept., 2007) citing *Ripp v. Ripp*, 38 AD2d 65, 327 NYS2d 465 affirmed at 32 NY2d 755, 344 NYS2d 950 (1973)). A partition action is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the proceeds of sale (*Kiernan v. Martin*, 48 AD3d 641, 852 NYS2d 351 (2nd Dept., 2008)). Prior to partition and sale, equity requires that such issues as the interests of the parties and whether partition may be had without great prejudice must first be determined (*Grossman v. Barker*, 182

AD2d 1119, 583 NYS2d 92 (4th Dept., 1992); *Wolfe v. Wolfe*, 187 AD2d 628, 590 NYS2d 504 (2nd Dept., 1992); *George v. Bridbard*, 113 AD2d 869, 493 NYS2d 794 (2nd Dept., 1985); *Moses v. Moses*, 170 AD 211, 155 NYS 1066 (1st Dept., 1915)).

Real Property Actions & Proceedings Law 915 provides:

Where the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, shall direct that the property or the part so circumstanced be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff shall direct that partition be made between the parties according to their respective rights, shares and interests and shall designate three reputable and disinterested freeholders as commissioners to make the partition so directed.

Based upon a preponderance of the evidence presented during trial, plaintiffs have established their right to a partition of the premises pursuant to Article 9 of the Real Property Actions & Proceedings Law. The proof adduced at trial showed that by deed dated April 25, 2003 and recorded in the County Clerk's Office on May 30, 2003 plaintiffs each obtained a one-third ownership interest in the premises. Having shown their right to possession of the property by the conveyance embodied by the deed, the plaintiffs proved their entitlement to a partition of the property (*see Dalmacy v. Joseph*, 297 AD2d 329, 746 NYS2d 312 (2nd Dept., 2002)).

The two remaining issues to be determined pursuant to the statute are: 1) the rights, shares and interests of the parties in the property; and 2) a decision concerning whether the property is so circumstanced that actual, physical partition of the 12+ acre parcel would cause great prejudice to the owners. At trial, evidence was submitted in the form of a title certification declaring that ownership of the premises was divided among the parties with plaintiffs each owning a 1/3rd interest, defendant V. Philips owning a 1/9th interest and 395 PL Realty, Inc. owning a 2/9th interest. Counsel for all parties stipulated to the respective parties ownership interests so that there is no issue but that the parties must divide the proceeds of any sale of the premises consistent with their ownership interests.

With respect to the defendant J. Philips claim that he is entitled to a life estate or some form of a share of ownership interest in the premises under the terms of the April 30, 2003 agreement, there is no legal basis to make such a finding. It is clear from the credible testimony adduced at trial that attempts were made by the parties to accommodate the defendant by granting him permission to remain on the premises during the year, except for the summer rental season. However there is no reasonable interpretation of the parties agreement to find that there was ever any intent to convey to J. Philips a life estate.

With respect to the issue of the feasibility of a physical partition of the parcel, the preponderance of the proof at trial demonstrated that a physical partition could not occur absent great prejudice to the owners. The proof submitted showed that the parcel could only be subdivided into no more than two lots, which would necessarily have to be divided among the four owners. The value of both lots would thereafter need to be equalized so that each owner received a value

commensurate with their respective ownership interests. Moreover, even were the Court to direct such a physical partition into the two lots proposed by the defendants' expert, final subdivision approval would remain subject to approval by the local town planning and zoning boards, with no guarantee that the subdivision would be approved. Given the time, expense and uncertainty of outcome surrounding this proposal, the evidence of great prejudice to the owners is clear and therefore the appointment of a referee to sell the premises as one lot at public auction is required pursuant to RPAPL 915.

Finally with respect to the issue of accounting, upon the sale of the premises by the referee, the proceeds shall be distributed to the parties in accordance with their ownership interests. The parties shall also share as a set-off (in accordance with their ownership interests) the amount required to pay off the mortgage encumbering the premises including interest and principal. The defendants application for a credit for back taxes paid is denied as the evidence at trial indicated that defendant J. Philips was responsible for payment of real estate taxes while he resided in the premises and based upon the 2003 agreement which provided the mechanism for disposing of any and all pending liens affecting the property so that the residence could be redeemed. The plaintiffs application for reimbursement for mortgage interest accrued since May, 2005 is also denied since the plaintiffs failed to prove by a preponderance of the evidence that the defendants breached the 2003 agreement. Accordingly it is

ORDERED that plaintiffs are granted judgment against the defendants with respect to the first cause of action for judicial partition of the premises pursuant to Article 9 of the Real Property Actions and Proceedings Law; and it is further

ORDERED that the second and third causes of action set forth in the plaintiffs' complaint and the first counter-claim set forth in the defendants' answer are hereby dismissed; and it is further

ORDERED that plaintiffs' counsel shall submit to the Court within twenty days of entry of this order, a proposed interlocutory judgment pursuant to RPAPL 915, for the purpose of appointing a referee to sell the premises at public auction.

Dated: November 14, 2014

HON. PAUL J. BAILEY, JR.

J.S.C.