

**Lacorte v Harley**

2015 NY Slip Op 30777(U)

May 5, 2015

Supreme Court, Suffolk County

Docket Number: 13-13277

Judge: James C. Hudson

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**COPY**

**Supreme Court - State of New York  
Suffolk County- J.A.S. Part XL**

**AMENDED**

**PRESENT:**

**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*

MOTION DATE 10-1-14 (#001)  
MOTION DATE 11-5-14 (#002)  
ADJ. DATE 11-5-14  
Mot. Seq. # 001 - MotD  
# 002 - XMotD

-----X  
ROBERT LACORTE, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 :  
 KELLY HARLEY, individually and as :  
 EXECUTRIX OR ADMINISTRATRIX OF THE :  
 ESTATE OF DEBORAH A. NOLAN, deceased, :  
 and CITI MORTGAGE INC., a Division of :  
 CITIBANK, N.A., :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 44 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21 ; Notice of Cross Motion and supporting papers 31 - 41 ; Answering Affidavits and supporting papers 24 - 28, 42 - 44 ; Replying Affidavits and supporting papers 29 - 30 ; Other memorandum of law 22 - 23; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED**, that the motion by the plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in his favor directing the sale of certain real property held by the parties as tenants in common, and declaring that he holds an 80% share in said property, is granted to the extent that the Court directs a sale of the real property and the appointment of a referee; and it is further

**ORDERED**, that the cross-motion by the defendant Kelly Harley, individually and as Executrix or Administratrix of the Estate of Deborah A. Nolan pursuant to CPLR § 3212 granting summary judgment in her favor declaring that said real property shall be partitioned and sold, declaring that she is the owner of a 50% share in said property, and that the plaintiff is not entitled to contribution for the expenses paid to maintain said property, is granted to the extent that the Court directs a sale of the real property and the appointment of a referee; and it is further

**ORDERED** that Robert A. Caccese, Esq., Fiduciary ID 659023, with offices located at 1000 Delmar Drive, Laurel NY 11948, is hereby appointed Referee pursuant to RPAPL 911 to determine and report the parties' respective rights, shares and interests in the property, and distribution of any proposed sale proceeds, as well as a presentment of a certified search for creditors pursuant to RPAPL 913; and it is further

**ORDERED** that pursuant to 22 NYCRR §36.1, the aforesaid appointee shall be subject to Part 36 of the Rules of the Chief Judge, and it is further

**ORDERED**, that by accepting this appointment the appointee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointments based on compensation"), and if the appointee is disqualified from receiving an appointment pursuant to the provisions of Part 36, the appointee shall notify the appointing Judge forthwith, and it is further

**ORDERED** that the Referee's fees shall be computed pursuant to CPLR § 8003.

This is an action pursuant to RPAPL Article 9 for the partition of real property located at 16 Ridge Drive in Melville, New York (the premises). The complaint alleges three causes of action. The first alleges that the plaintiff and the defendant's decedent were the owners as tenants in common of the premises, and that a partition of the property is not feasible, requiring a sale thereof. The second alleges that, due to the disproportionate amount contributed by the plaintiff to the purchase and maintenance of the premises, he is entitled to a judgment declaring his interest and share in the property to be 80%. The third, sounding in unjust enrichment, seeks to recover the additional sums allegedly paid by the plaintiff regarding the premises in the event that the Court determines that he holds a 50% share in the premises.

The defendant Kelly Harley (the defendant) is the daughter of the deceased, Deborah A. Nolan (Nolan). It is undisputed that the plaintiff and Nolan began a romantic relationship in 2005, that they purchased the premises as tenants in common in April 2005, and that they became engaged to be married sometime thereafter. In order to complete the subject

purchase, the plaintiff contributed a much greater proportion of the monies needed to close title, and he and Nolan jointly executed a mortgage which is now held by the defendant Citi Mortgage Inc., a division of Citibank, N.A. (Citibank).<sup>1</sup> In October 2005, the plaintiff and Nolan decided to lease the premises to others. In 2012, Nolan passed away. From the date of the purchase of the premises until the making of this motion by the plaintiff, the plaintiff has collected all of the rent regarding the rental of the premises and he has paid all of the costs and maintenance relative to ownership of the premises except for a very modest amount paid early on by Nolan.

The plaintiff now moves for summary judgment herein. A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

In support of his motion,<sup>2</sup> the plaintiff submits, among other things, his affidavit, the affirmation of his attorney, the pleadings, documentation allegedly indicating payments made by him relative to the purchase and maintenance of the premises, and a copy of the deed reflecting the purchase of the premises. The deed reveals that the subject real property was conveyed to the plaintiff and Nolan as tenants in common on April 1, 2005. In his affidavit, the plaintiff swears that, because he and Nolan had only been dating for a short while, they purchased the property as an investment property with the intention to make it their marital residence should the relationship grow, and that, even then, they knew that it would be some time before they would reside at the premises because Nolan wanted the defendant to complete high school beforehand. He indicates that, from 2005 until Nolan passed away in 2102, he and the defendant did not establish any type of relationship, and that there was never any discussion between Nolan, the defendant and himself regarding the premises. He states that, from April 2005 to September 2014, the defendant may have been to the premises once, and that the defendant never inquired about the costs and expenses of maintaining the premises, even after Nolan passed away. The plaintiff further swears that, because Nolan

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<sup>1</sup> Citibank submits an affirmation in limited opposition to the plaintiff's motion wherein it is stated that said defendant takes no position with respect to the relief sought by the plaintiff and merely wishes to inform the Court about certain financial issues regarding its interest in the property.

<sup>2</sup> It is noted that the pleadings are not submitted as exhibits to the affirmation or affidavit submitted herein, that the paragraphs in said affirmation and affidavit are not numbered neither are they paginated. In addition, the attached exhibits are not tabbed or even separated by different colored paper to enable reasonable access thereto. While it is obvious that none of this affects the outcome of the application, in the future counsel can assist the Court by ensuring that the motion papers submitted are presented in a more organized form.

wanted “to keep as much as possible from her daughter,” he cared for Nolan throughout the illness that claimed her life.

The plaintiff has established his entitlement to summary judgment on his first cause of action seeking a partition or sale of the property as a matter of right (Real Property Actions & Proceedings Law Article 9; *Donlon v Diamico*, 33 AD3d 841, 823 NYS2d 438 [2d Dept 2006]; *Tedesco v Tedesco*, 269 AD2d 660, 702 NYS2d 459 [3d Dept 2000], *lv denied* 95 NY2d 791, 711 NYS2d 158 [2000]; 24 NY Jur 2d, Cotenancy and Partition §§ 126-131; 3 Warren’s *Weed NY Real Property, Common Ownership of Real Property* § 27.18 [1]-[3]). This branch of the plaintiff’s motion is unopposed, and the defendant’s cross motion, discussed below, requests the very relief granted to the plaintiff in this decision.

In addition, the plaintiff has established his entitlement to summary judgment on his second cause of action that he is entitled to a greater share and interest in the proceeds of the sale of the premises based on the equities, but not as to the amount of that share or interest. It is well settled that “[a] partition action, although statutory, is equitable in nature and the court could compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale” (*Costanza v Galluzzo*, 41 AD3d 414, 835 NYS2d 919 [2d Dept 2007], *quoting Cook v Petito*, 208 AD2d 886, 619 NYS2d 571 [2d Dept 1994]; *see also Berlin v Wojnarowski*, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]; *Lemcke v Lemcke*, 13 AD3d 1062, 787 NYS2d 562 [4th Dept 2004] *Hunt v Hunt*, 13 AD3d 1041, 788 NYS2d 219 [3d Dept 2004], *lv denied* 8 NY3d 812, 836 NYS2d 551 [2007]). In ascertaining the equities involved, an accounting is necessary to assist in determining the parties’ rights, shares and interests in the real property and any sale proceeds (RPAPL 911; *Tedesco v Tedesco*, *supra*; *Deitz v Deitz*, 245 AD2d 638, 664 NYS2d 868 [3d Dept 1997]). Therefore, the Court directs that the appointed Referee shall determine and report whether there is any creditor, not a party, who has a lien upon the undivided share or interest of any party; and shall determine and report the rights, shares and interests of all parties before interlocutory judgment is rendered.

It is determined that the plaintiff’s third cause of action sounding in unjust enrichment is academic in light of the Court’s findings herein, and its reference of the matter to a Referee to determine and report on the equities between the parties. Accordingly, the plaintiff’s motion is granted to the extent that the Court directs a sale of the real property and the appointment of a referee.

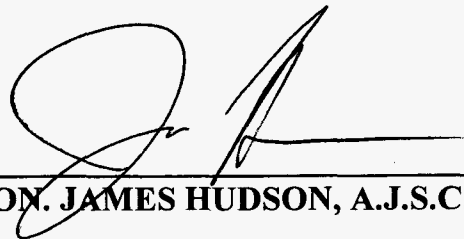
In opposition to the motion, the defendant cross-moves for summary judgment in her favor declaring that said real property shall be partitioned and sold, declaring that she is the owner of a 50% share in said property, and that the plaintiff is not entitled to contribution for the expenses paid to maintain said property. In support of her cross motion, the defendant submits, among other things, the pleadings, her deposition and that of the plaintiff, the same

documentation submitted by the plaintiff in support of his motion, the affirmation of her attorney, and the affidavit of her uncle, Timothy Harley.

It is noted that the cross motion does not contain a copy of letters of administration regarding the subject estate. At her deposition, the defendant testified that she filed a petition with the court for said letters, but she does not indicate who the distributees might be. Without such evidence the Court is not able to determine if Nolan's title in the premises devolved to the defendant alone or with others by operation of law. However, in light of the Court's reference to a Referee herein, said issues can be resolved in that context.

The first branch of the defendant's cross motion is deemed academic as it requests the very relief granted to the plaintiff in this decision. The second branch of said cross motion seeking a declaration that the defendant is the owner of a 50% share in the premises is granted to the extent that the matter is referred to a Referee. In his affirmation, counsel for the defendant contends that there is a presumption of equal ownership when a deed merely lists the parties as tenants in common. Nonetheless, both the plaintiff and counsel for the defendant acknowledge that the presumption may be rebutted (*McGuire v McGuire*, 93 AD3d 701, 939 NYS2d 572 [2d Dept 2012]). In addition, the defendant's contentions that, because the plaintiff and Nolan executed a joint mortgage at the closing of title to the premises, and the plaintiff claimed a 50% interest in the premises on his tax returns prior to commencing this action, the relative shares of ownership in the premises has been established as a matter of law, is without merit. The defendant's submission fails to establish her prima facie entitlement to summary judgment on the issue of her share of ownership in the property. Regardless, her submission of the plaintiff's documentation establishing his disproportionate contributions to the purchase and maintenance of the property raises issues of fact regarding both the relative shares of ownership and the validity of the aforesaid presumption, all of which requires the reference to a referee. It is determined that the third branch of the defendant's cross motion seeking a declaration that the plaintiff is not entitled to contribution for the expenses paid to maintain said property is academic in light of the Court's findings herein, and its reference of the matter to a Referee to determine and report on the equities between the parties. Accordingly, the defendant's cross motion is granted to the extent that the Court directs a sale of the real property and the appointment of a referee.

DATED: MAY 5, 2015



HON. JAMES HUDSON, A.J.S.C.

\_\_\_\_ FINAL DISPOSITION        X   NON-FINAL DISPOSITION