

<b>Iannucci v Fiorentino</b>
2015 NY Slip Op 32722(U)
October 28, 2015
Supreme Court, Suffolk County
Docket Number: 4904/15
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 8/6/15  
SUBMIT DATE 9/25/15  
Mot. Seq. # 001 - MotD  
Mot. Seq. # 002 - X Mot D  
CDISP Y     N   X  

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JOSEPH IANNUCCI, JR.,	:
	:
Plaintiff,	:
	:
-against-	:
	:
NICOLE FIORENTINO,	:
	:
Defendant.	:
	:
-----X	

NATALE J. TARTAMELLA, ESQ.  
Atty. For Plaintiff  
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Upon the following papers numbered 1 to 12 read on this motion for partial summary judgment and cross motion to furnish disclosure; Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-8; Answering papers 9-10; Reply papers 11-12; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by the defendant for "partial summary judgment" in the form of an order directing an immediate sale by the referee of the premises that are the subject of her First and Second counterclaims sounding in partition and sale and the distribution of the proceeds based upon her rights, shares, and/or interests in the premises, is considered under CPLR 3212 and RPAPL Article 9 and is granted only to the limited extent set forth below; and it is further

**ORDERED** that the cross motion (#002) by the plaintiff for an order: 1) directing the parties to disclose, produce and exchange an accounting of income and expenditures made for the maintenance, repair, upkeep and acquisition costs and items taken or removed; 2) scheduling a hearing and/or trial with respect to claims arising out of the accountings produced by the parties; 3)

upon the plaintiff's production of a lien search as to creditors, ascertainment by the Court whether any such lien should be recognized and recited in the interlocutory or final judgment; 4) upon the court's ascertainment of the rights of the parties and the ascertainment and recital of any lien, issuance of an interlocutory judgment pursuant to RPAPL § 915; 5) the appointment of referee of sale, the terms of which are set forth in the interlocutory judgment issued; and 6) a preliminary injunction restraining the defendant from selling, transferring or disposing of the engagement ring which is the subject of the plaintiff's second cause of action, is considered under RPAPL Article 9 and CPLR 6311 and is granted only to the limited extent set forth below.

The claims interposed by the parties to this action arise out of their purchase, as joint tenants with survivorship rights, of an improved parcel of residential real property in Smithtown, New York in November of 2013, an engagement ring given to the defendant by the plaintiff, the payment of wedding events and the termination of the parties' relationship in August of 2014. According to the plaintiff, the defendant vacated the subject premises on August 30, 2014, without the consent of the plaintiff, while the defendant claims that the defendant ousted her by changing the locks and by barring her from returning thereto.

In the complaint served and filed herein, the plaintiff seeks a partition of the subject premises or partition and sale if it be determined that actual partition may not be had without great prejudice to the parties' interests therein, and a division of the proceeds of sale according to the respective parties' rights, shares and interests upon an accounting of contributions, expenses and the like. In the Second cause of action, the plaintiff seeks the return of the engagement ring. In the remaining three causes of action, the plaintiff seeks recovery of a vacuum cleaner given to him and the defendant or its value under unjust enrichment theories and reimbursement for wedding expenses allegedly paid by the plaintiff. In the answer served, the defendant counterclaims for a judgment of partition and sale; distribution of the proceeds of the sale in accordance with the parties' rights, shares and interests as determined by a referee; a claim for, in effect, a judicial declaration that the defendant is entitled to keep the engagement ring; recovery of wedding expenses paid by the defendant; and the recovery of legal fees incurred by the defendant.

The defendant now moves (#001) for "partial summary judgment" on her partition counterclaim, in the form of an order directing the immediate sale of the property by a duly appointed referee of sale who shall thereafter ascertain the rights of the parties and an order directing the plaintiff to account for all income and expenses with respect to the property. The plaintiff cross moves (#002) for an order directing the parties to disclose and exchange an accounting of income and expenditures made for the maintenance, repair, upkeep and acquisition costs of the premises and items taken or removed therefrom. The plaintiff further demands an order scheduling a hearing or trial with respect to claims arising out of the accountings produced by the parties and upon the

plaintiff's production of a lien search as to creditors, and an order by the court determining whether any such lien should be recognized and recited in the interlocutory or final judgment. Upon the court's ascertainment of the rights of the parties and its ascertainment and recital of any lien, the plaintiff demands that an interlocutory judgment issue by the Court pursuant to RPAPL § 915. Also demanded is the appointment of a referee of sale, the terms of which shall be set forth in the interlocutory judgment issued. Finally, the plaintiff seeks a preliminary injunction restraining the defendant from selling, transferring or disposing of the engagement ring which is the subject of the plaintiff's second cause of action.

For the reasons stated, the motion and cross motion are granted only to the extent set forth below.

The ancient remedies of actual partition and of partition and sale are premised in equity and are now codified in Article 9 of the Real Property Actions and Proceedings Law (*see Chang v Chang*, 137 AD2d 371, 529 NYS2d 294 [1<sup>st</sup> Dept 1988]; *Worthing v Cossar*, 93 AD2d 515, 462 NYS2d 920 [4<sup>th</sup> Dept 1983]; *Grody v Silverman*, 222 AD 526, 226 NY 468 [1928]). Under RPAPL § 901, "a person holding and in possession of real property as a joint tenant or tenant in common, in which he [or she] 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" (RPAPL § 901[1]; *Tsoukas v Tsoukas*, 107 AD3d 879, 968 NYS2d 109 [2d Dept 2013]). Viable claims for partition and sale thus rest upon allegations of a joint or common ownership in real property, some showing that the equities favor the plaintiff and, where a sale rather than an actual partition is demanded, that a physical partition of the premises cannot be made without great prejudice to the parties (*see Galitskaya v Presman*, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; *Cadle Co. v Calcadore*, 85 AD3d 700, 926 NYS2d 106 [2d Dept 2011]; *James v James*, 52 AD3d 474, 859 NYS2d 479 [2d Dept 2008]).

The equitable nature of the remedies of partition and partition and sale permits the court to direct a severance of joint tenancies by a court-ordered partition that adjusts the rights of the parties and permits a sale of the premises where actual partition cannot be made without great prejudice to the parties (*see Trotta v Olliver*, 91 AD3d 8, 933 NYS2d 66 [2d Dept 2011]); *see also Koniosis v Tsororos*, 83 AD3d 665, 920 NYS2d 403 [2d Dept 2011]). Accordingly, 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]; *see also Berlin v Wojnarowski*, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a co-tenant (*see Worthing v Cossar*, 93 AD2d 515, 517, 462 NYS2d 920 [4<sup>th</sup> Dept 1983]), as may a receipt by one party of more than his or her proper proportion of the rents, profits or like interest in the premises. Accountings

by the parties have thus been held to be a necessary incident of a partition action and should be had as a matter of right before entry of an interlocutory or final judgment and before any division of money between the parties is adjudicated (*see Sampson v Delane*, 34 AD3d 349, 824 NYS2d 277 [1st Dept 2006]; *Donlon v Diamico*, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]; *McVicker v Sarma*, 163 AD2d 721, 558 NYS2d 997 [2d Dept 1990]; *Worthing v Cossar*, 93 AD2d 515, 462 NYS2d 920 [2d Dept [1983]]).

As indicated above, a determination as to whether the property or any part thereof is so circumstanced that a physical partition thereof cannot be made without great prejudice to the owners must be made where a sale is demanded (*see* RPAPL § 915) and, a determination must be made as to the rights, shares, or interests of the parties, which determination may include findings as to the parties' claims for an adjustment of the rights of any party due to the payment of excess expenditures by one party and/or the receipt by one party of more than his or her proper proportion of the rents, profits or interest in the premises. These determinations must be included in the interlocutory judgment contemplated by RPAPL § 915, along with either a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; *Hales v Ross*, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011]; *see also Lauriello v Gallotta*, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; *Wolfe v Wolfe*, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties' claims and for an adjustment of such rights must be made by declaration of the court, directly, or by the court after a reference to take proof and report (*see* RPAPL § 911; § 907; *Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interests in the premises is also required and, if there be any such creditors, proceedings thereon must be held as required by RPAPL § 913 where, as here, a sale is demanded. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference and the proceedings required thereon by RPAPL § 913, a finding to that effect should issue.

In light of these statutory prescriptions, the defendant's demand for an immediate sale of the premises is denied. These demands are interdicted by the procedural mandates imposed upon the court by the statutory provisions cited above and by controlling appellate case authorities (*see Donlon v Diamico*, 33 AD3d 841, *supra*; *see also Sampson v Delane*, 34 AD3d 349, *supra*). While summary judgment has issued on claims for partition with a direction for an immediate sale and a reservation of the determination of disputed issues regarding claimed adjustments to the distribution of the proceeds of sale in cases where there was no dispute as to the ownership interests of the parties in the premises, the rights or non-existence of creditors or that the remedy of partition and sale rather than actual partition was proper because a physical partition would greatly prejudice the owners (*see McCormick v Pickert*, 51 AD3d 1109, 856 NYS2d 306 [3d Dept 2008]; *Wong v Chi-*

*Kay Cheung*, 46 AD3d 1322, 847 NYS2d 793 [3d Dept 2007]), only the last of these factors appears to be indisputable here. In any event, controlling appellate case authorities emanating from the Second Department and others have held otherwise particularly where findings regarding the income and expenses of the premises and equitable adjustments to the shares or interests in the premises are demanded and not determinable as a matter of law (see *Donlon v Diamico*, 33 AD3d 841, *supra*; *Sampson v Delane*, 34 AD3d 349, *supra*). The defendant's demands for an immediate sale of the premises is thus denied. The defendant's demands for reference as to the ascertainment of the respective rights, shares and interests of the parties in the premises and an order directing the plaintiff to account for all income and expenses with respect thereto are granted only to the extent set forth below.

The court also denies the plaintiff's cross motion (#002) for discovery exchanges, as the interposition of the cross application for summary judgment may be deemed an admission that discovery was complete. In any event, the granting of the of the remedy of partition and sale together with the directives for an exchange of demands and proofs with respect to the costs and expenditures of the premises directed below forecloses the issue. The plaintiff's demand for a hearing by the court as to an accounting between the parties, rather than by reference of the kind provided for in RPAPL § 911, is denied. The absence of any dispute with respect to the parties' entitlement to a severance of their joint tenancy by the remedy of partition and sale renders the reference set forth in RPAPL § 911 available to this court. Since both parties moved for summary judgment on their claims for partition and sale and in light of the nature of the subject property, which is improved with a residence, the court finds said premises are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners. The court thus grants summary judgment on the parties' claims for partition and sale, subject to the reference directed below and to the further reference to sell and report which shall be a subject of the interlocutory judgment to be entered herein.

The plaintiff's demands for a preliminary injunction restraining the defendant from selling, transferring or disposing of the engagement ring which is the subject of the plaintiff's second cause of action is denied. It is well settled law that an entitlement to preliminary injunctive relief rests upon the establishment of the following three elements: (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (see *306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028, 935 NYS2d 619 [2d Dept 2011]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Board of Mgrs. of the Britton Condominium v C.H.P.Y. Assoc.*, 101 AD3d 917, 918, 900 NYS2d 747 [2d Dept 2010]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). A movant must satisfy each requirement with "clear and convincing evidence" (*County of Suffolk v Givens*, 106 AD3d

943, 967 NYS2d 666 [2d Dept 2013] quoting *Apa Sec., Inc. v Apa*, 37 AD3d 502, 503, 831 NYS2d 201 [2d Dept 2007]). “Where the plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief” (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]; quoting *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763, 880 NYS2d 647 [2d Dept 2009]). Accordingly, a preliminary injunction will not issue where the harm alleged is purely economic in nature (see *Quick v Quick*, 69 AD3d 827, 892 NYS2d 769 [2d Dept. 2010]) or where such harm is remote or speculative (see *County of Suffolk v Givens*, 106 AD3d 943, *supra*; *Norton v Dubrey*, 116 AD3d 1215, 983 NYS2d 679 [3d Dept 2014]; *Rowland v Dushin*, 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; *Family-Friendly Media, Inc. v Recorder Tel.*, 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]).

Here, the plaintiff failed to demonstrate that, absent the requested preliminary injunctive relief, he would sustain imminent irreparable harm of a non-economic nature that is real and concrete rather than remote or speculative. There are no allegations that the defendant possesses the ring and that she is or will dispose of it in a manner that will irreparably harm the plaintiff or render any judgment he may obtain, ineffectual, since monetary damages will fully compensate him for any loss sustained. The plaintiff’s application for the preliminary injunctive relief outlined above is thus denied.

As to the remaining portions of the parties’ motions, the court grants same only to the following limited extent and it denies all other demands for relief not set forth below. Accordingly the court further orders as follows:

**ORDERED** that the cross applications for summary judgment on the parties’ claims for partition of the subject premises are granted subject to the matters referred below, as the court finds that the subject premises are so circumstanced that an actual physical partition could not be had without great prejudice to the owners; and it is further

**ORDERED** that STEPHEN L. O’BRIEN, 168 Smithtown Blvd., Nesconset, NY 11767, (631) 265-6660, Fiduciary ID# 193676, is hereby appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the parties to this action in the properties described in the complaints filed in the above entitled action in which partition and sale is sought, and an abstract of the conveyances by which the same are held, and to take proof of the parties’ title and interest in the subject properties, and of the several matters set forth in the pleadings such as, costs of insurance, taxes and other expenses of the subject premises as may have been paid by the parties and their entitlements to an adjustment thereof, if any, and the receipt of income, rents and profits and whether adjustments thereof have been proved, after receipt of the parties’ submission

of written demands, accounts and proofs of such items and after affording them the right to be heard with respect thereto; and the referee is directed to report on these matters; and the court having determined herein that the remedy of partition and sale is appropriate, because the subject property is so circumstanced that actual partition thereof cannot be made without great prejudice to the owners, the referee shall ascertain whether there are any creditors, not a party to this action, who have liens on the undivided share or interest of any party and, if so, the amount and the priorities of such lien, and to report thereon to the court this matter and the others listed above as directed below; and it is further

**ORDERED** that within 30 days of the date of this order, the plaintiff shall serve upon the Referee a search, certified by the Suffolk County Clerk, as to the existence of any and all liens against the subject property; and if the referee ascertains the existence of at least one non-party creditor, said referee shall forthwith cause a notice in the form set forth below to be published once in each week for four (4) successive weeks in the \_\_\_\_\_, requiring each person not a party to this action who, at the date of this order, has a lien upon any undivided share or interest in the property to appear before the referee at a specified place and on or before a specified day to prove his or her lien and the true amount due to him or her by reason thereof; and the referee shall further serve all known creditors with such notice by mail at such creditor's last known address, if known to the referee, not less than twenty (20) days prior to the specified hearing date; and it is further

**ORDERED** that the notice to nonparty creditors required by RPAPL § 913, if any, shall issue by the referee in the following form:

NYS SUPREME COURT, COUNTY OF SUFFOLK

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JOSEPH IANNUCCI, JR.	:	Index No. 04904/2015
	:	
Plaintiff,	:	Assigned to:
	:	Justice Whelan
-against-	:	
	:	
NICOLE FIORENTINO,	:	
Defendant.	:	

-----X

TO ALL CREDITORS, PARTIES OR NOT, TO THE ABOVE ENTITLED ACTION WHO HAVE LIENS ON THE UNDIVIDED SHARE OR INTEREST OF ANY PARTY:

PLEASE TAKE NOTICE that each and every person whether a party or not a party to the above entitled action who, at the date of the order appointing the undersigned referee namely, \_\_\_\_\_ (date) had a lien upon any undivided share or interest of a party in the property hereinafter described, is hereby required to appear before the undersigned at \_\_\_\_\_ (address), \_\_\_\_\_ (city), New York, on or before \_\_\_\_\_ (date), to prove such lien and the true amount due or to become due by reason thereof.

The properties herein are described in the complaint as follows: 39 Fulton Avenue, Smithtown, New York 11787. .

DATED: \_\_\_\_\_ (Referee).

and it is further,

**ORDERED** that the plaintiff is directed to forward the cost of the publication herein directed to the referee within three days of receipt of a written demand therefor, without prejudice to the interposition of a claim against the defendant for a credit of one-half of such amount at the time the referee's application for the fixation of his compensation, costs and expenses is made; and it is further

**ORDERED** that the Referee shall serve due notice of the RPAPL § 913 lien hearing date to counsel for the parties and to known creditors by mail, on not less than 20 days prior to such date, and shall conduct the hearing thereon on such date and may notice a hearing of the parties on all the other matters embraced by this reference, provided notice of the hearing of these additional matters is likewise given to counsel; but said referee is empowered to separately notice and conduct such further hearings on 20 days notice to counsel for the parties and others, if any be entitled, with respect to the other issues related to the other matters embraced by the reference framed above; and it is further

**ORDERED** that the Referee shall report his undertakings and findings to the Court, sequentially, following each hearing conducted, as to the matters embraced by the reference that were heard, with due and deliberate speed, and it is further

**ORDERED** that, within 75 days of the date hereof, the parties shall serve upon the referee and counsel for the adverse party, a single submission of documents that include copies of the parties' pleadings and an itemized statement of their demands for an adjustment of their rights, shares and interests in the premises due to their payment, in excess of their obligations under the law, of the expenditures made for ordinary maintenance, taxes, insurance and other necessary costs

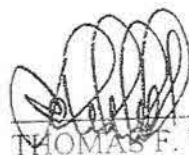
,together with documentary proof of both the costs charged for such items and the payments made; sworn statements by each party as to their receipt of any income of any kind from the property including rent, insurance proceeds or other reimbursements since August 1, 2014; and the parties' respective demands for adjustments due to the receipt, by the other party, of more than his or her proper proportion of the rents, profits, income, proceeds, reimbursement or other interest in the premises; and such other demands and proofs as the parties may wish to submit, in this single submission to the referee which must include due proof of service upon the adverse party; and it is further

**ORDERED** that pursuant to CPLR 8003(a), the compensation of the referee herein appointed is fixed at the rate of a reasonable hourly fee not exceeding \$250.00 per hour and a calculation of the total thereof, together with cost and disbursements, shall be included in the report of the referee and supported by an affirmation of services which shall be attached to said report and served upon all parties together with an application for approval thereof; and the compensation of the referee, together with all costs and expenses, shall be fixed and determined by the court, after affording the parties the opportunity to submit responses to the referee's demands for compensation and fees, the payment of which, shall also be assessed against the parties as directed by the court in an order issued upon such application; and it is further

**ORDERED** that pursuant to 22 NYCRR §36.1, the referee herein appointed 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.

DATED: 10/28/15



THOMAS F. WHELAN, J.S.C.