

Stadelmann v Coleman
2017 NY Slip Op 31007(U)
April 12, 2017
Supreme Court, Suffolk County
Docket Number: 13693/10
Judge: Thomas F. Whelan
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COPY

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 12/15/16
SUBMIT DATE 03/31/17
Mot. Seq. # 004 - MOTD
Submit Interlocutory Judgment
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JOHN C. STADELMANN,	:		:	DAVID P. FALLON, PLLC
	:		:	Atty. For Plaintiff
	:	Plaintiff,	:	53 Main St. - Ste. 1
	:		:	Sayville, NY 11782
	:		:	
-against-	:		:	GERI HENLE, ESQ.
	:		:	Guardian Ad Litem
JEANETTE COLEMAN,	:		:	For Defendant
	:		:	131 Union Ave.
	:	Defendant.	:	Riverhead, NY 11901
	:		:	
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Upon the following papers numbered 1 to 4 read on this motion for an interlocutory judgment pursuant to RPAPL § 915; Notice of Motion/Order to Show Cause and supporting papers 1-2; Notice of Cross Motion and supporting papers _____; Opposition papers _____; Reply papers _____; Other 3-4 (GAL Response); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#004) by the plaintiff in this partition action for a determination of shares and other matters necessary for the issuance of an interlocutory judgment of the type contemplated by RPAPL § 915 is considered under RPAPL Article 9 and is granted.

The plaintiff commenced this partition action in April of 2010 against his sister, defendant Jeanette Coleman, who together with the plaintiff, hold title to a parcel of unimproved real property located in East Marion, New York as tenants in common. In May of 2010, the plaintiff served the summons and complaint upon the defendant pursuant to CPLR 308(2) at her residence in Amelia, Virginia. The defendant defaulted in answering the summons and complaint. Sometime thereafter, the plaintiff learned that the defendant had become legally incapacitated within the contemplation of CPLR 1201 due to her affliction with dementia and/or Alzheimer's disease. Under these circumstances, entry of a default judgment against the defendant was precluded by the provisions of CPLR 1203. In March of 2015, the plaintiff moved for the appointment of a guardian ad litem, which application was granted by order of this court dated April 27, 2015.

Following her due qualification, the Guardian Ad Litem appeared in this action for the defendant and undertook an investigation which confirmed the residency of her ward at a long term health care facility in Virginia and that the defendant was incapacitated within the purview CPLR 1201. An answer to the complaint in which the Guardian Ad Litem asserted a counterclaim for partition and sale, was recently filed.

By the instant motion (#004), the plaintiff seeks, in essence, an interlocutory judgment on its complaint for partition and sale upon a determination of this court as to the respective shares and interests of the plaintiff and the defendant in the subject premises and that the premises are so circumstanced that actual partition may not be had without great prejudice to the parties thereby entitling the plaintiff to the remedy of partition and sale instead of actual partition. The plaintiff further seeks a determination that there are no creditors having interests or liens upon the premises which obviates the need for the proceedings with respect to creditors contemplated by RPAPL § 913.

As for the division of the proceeds from the sale, the plaintiff asks the court to direct that each party be credited with their respective payments of real property taxes and first be paid said amounts from the proceeds derived from the sale and that the remaining net proceeds be distributed as follows; 50% to the plaintiff and 50% to the defendant, with the fees awarded to the Guardian Ad Litem be paid out of the defendant's 50% share of the net proceeds. The plaintiff also seeks the issuance of an interlocutory judgment pursuant to RPAPL § 915, determining the foregoing issues as proposed and appointing a referee to conduct a public sale of the premises. Because these matters were the subject of a written settlement stipulation, which the plaintiff and the Guardian Ad Litem executed in October of 2015, the plaintiff asks that his motion be granted.

The Guardian Ad Litem does not object to most of the relief requested on the instant motion as there is no dispute that the plaintiff and defendant each own a one-half interest in the premises, or that such premises are so circumstanced that an actual partition cannot be made without great prejudice to the parties thereby allowing the parties the remedy of partition and sale and that there are no creditors. The Guardian Ad Litem does, however, contend that court approval of any settlement is required and that she is without authority to apply for such approval and to collect the amounts due to the defendant as directed in any final judgment rendered herein under controlling statutory and appellate case authorities. Consequently, the stipulation of October 23, 2015 is not binding but merely provides a platform for the relief requested by the plaintiff on his motion which the court is free to reject.

For the reasons stated, the plaintiff's motion (#004) is granted with modifications to the proposed distribution of the proceeds as 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 [1st Dept 1988]; *Worthing v Cossar*, 93 AD2d 515, 462 NYS2d 920 [4th 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 Calcador*, 85 AD3d 700, 926 NYS2d 106 [2d Dept 2011]; *James v James*, 52 AD3d 474, 859 NYS2d 479 [2d Dept 2008]).

Before a partition or sale may be directed, a determination must be made as to the rights, shares, or interests of the parties and in cases wherein a sale is demanded, whether the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners (*see* RPAPL § 915). Such 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 must be made by declaration of the court directly or 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]; *see also Colley v Romas*, 50 AD3d 1338, 857 NYS2d 260 [3d Dept 2008]).

In addition, an 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, after notice, as required by RPAPL § 913. While the court may accept proof of the absence of the existence of any such creditor and dispense with its inquiry or the reference and the proceedings required thereon, the court may issue findings to that effect for the clarity of the record.

Due to the equitable nature of a partition action, accountings by and between the parties have 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]). However, a sale without an accounting is permissible in cases wherein no accounting is demanded nor any claims asserted for an adjustment of the rights of any party due to receipt by one party of more than his or her proper proportion of the rents, profits or share interest in the premises (*see Robert McCormick v Pickert*, 51 AD3d 1109, 856 NYS2d 306 [2d Dept 2008]).

Here, there is no dispute as to the 50% ownership interests of the parties in the premises, that the remedy of partition and sale is available due to the circumstances of the premises, that there are no creditors not joined as party defendants and that the court may determine these issues and the

others contemplated by RPAPL §§ 911, 913 and 915 without a reference pursuant to RPAPL §911 and §913. With respect to the proposed equal distribution of the proceeds derived from the sale, the only adjustment sought by the plaintiff is the crediting of each party with real estate taxes paid by them and the payment of the fees of the Guardian Ad Litem solely out of the defendant's share of the sale proceed. Since the parties have jointly put these issues before the court, engagement in formal accounting proceedings between the parties that might otherwise be necessary to determine the propriety of the proposed adjustment are not necessary here.

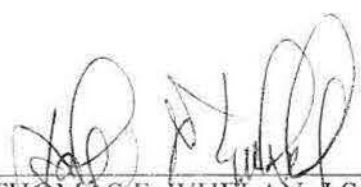
Under these circumstances and in light of the pleadings served, wherein both the plaintiff and the defendant seek the remedy of partition and sale and an equal division of the proceeds in accordance with the undisputed 50% ownership interest of each party in the subject premises, the plaintiff's submission of satisfactory proof as to the non-existence of creditors, and due proof that the property, which is a vacant lot and now conforms to applicable zoning requirements for its development as a single family residence, is so circumstanced that it could not be actually partitioned without great prejudice to the rights of the parties, the court finds that the parties are entitled to an interlocutory judgment adjudicating these issues as proposed. Accordingly, the court hereby determines and declares as follows: 1) that the plaintiff and the defendant own a 50% interest in the subject premises as tenants in common; 2) that the premises are so circumstanced that actual partition cannot be had without great prejudice to the rights of the parties, and accordingly the plaintiff and defendant are hereby awarded the remedy of partition and sale as demanded by them in their pleadings; 3) the plaintiff has submitted satisfactory proof of the kind set forth in RPAPL § 913, that there are no creditors having any liens or other claims of record against the premises and that the Inquiry of Creditors and other proceedings within the purview of RPAPL § 913 are hereby unnecessary and thus dispensed with; 4) that the plaintiff and defendant are entitled to an equal 50% distribution of the *net proceeds* derived from the sale as such *net proceeds* are defined and determined below; and 5) that the parties are entitled to the appointment of a referee of sale.

The plaintiff's proposal for a distribution of the proceeds derived from the sale with adjustments for real estate taxes paid and the payment of the fees of the Guardian Ad Litem, is, however, rejected in part. This court shall not require the defendant, alone, to bear the cost of her guardianship by directing that the compensation awarded to the Guardian Ad Litem be paid out her 50% share of the net proceeds of the sale after the parties are credited with their respective payments of real estate taxes. Accordingly, the court hereby finds, determines and declares that the compensation awarded to the Guardian Ad Litem for the services rendered to her ward shall be paid, first, out of the proceeds of the sale, and that a credited payment for real estate taxes paid by the plaintiff in the amount of \$5,000.22, plus those paid by him in 2016 and 2017, if any, and those paid by the defendant in the amount of \$1,213.62, shall be paid next out of the proceeds of the sale of the premises. The *net proceeds* available for distribution to the parties, equally at 50%, are thus defined as those proceeds left after the payment of the compensation awarded to the Guardian Ad Litem under further order of this court and the payment of the credited real estate taxes paid by the parties as set forth above.

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In view of the foregoing, the plaintiff's motion is granted to the extent set forth herein. Counsel shall submit, on notice to the defendant's Guardian Ad Litem, a proposed Interlocutory Judgment of Partition and Sale containing all findings, determinations and declarations of the court as set forth in this Memo Decision and Order and providing, in blank for the appointment of a referee of sale in accordance with RPAPL § 915, and such other necessary matters, including those required by 22 NYCRR Part 36.

DATED: April 12, 2017



THOMAS F. WHELAN, J.S.C.