

**Goch v Roybal**

2019 NY Slip Op 31753(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 160555/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARLENE P. BLUTH **PART** IAS MOTION 32

*Justice*

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**INDEX NO.** 160555/2018

SHELLY GOCH

**MOTION DATE** N/A

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

ANDREA ROYBAL,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment is granted to the extent that the Court finds that the apartment should be sold and the Court will hold a hearing to determine each party's equitable share in the sale proceeds of the property. The cross-motion by defendant for leave to amend is denied.

**Background**

This partition action concerns an apartment at a housing development fund corporation ("HDFC") located on East 10<sup>th</sup> Street in Manhattan. Plaintiff purchased the property in 1992 and plaintiff and defendant split the shares as joint tenants. In 2011, the relationship between plaintiff and defendant deteriorated. Plaintiff left the apartment—the parties disagree over whether plaintiff voluntarily left or whether she was ousted by defendant. The parties also dispute whether defendant changed the locks sometime in 2013—defendant insists that management changed the locks in October 2012.

There is no dispute that plaintiff has not lived in the apartment since 2011. Instead, she has lived in an apartment in the Rockaways. In 2014, plaintiff commenced an action (Index No. 159475/2014) in which she sought a declaratory judgment that she was the sole owner of the apartment and use and occupancy from defendant. That case was later discontinued. The property consists of 250 shares and plaintiff argues that the property must be sold because it cannot be physically partitioned.

### **Defendant's Cross-Motion**

Defendant cross-moves for leave to amend to add a fourth affirmative defense that plaintiff's failure to maintain the premises as her primary residence under the proprietary lease eliminates her ownership rights in the HDFC. That cross-motion is denied. The proprietary lease is between the shareholders of the HDFC and the HDFC; defendant has no standing to raise this affirmative defense. Only the HDFC can seek a determination that plaintiff defaulted on this term of the agreement.

### **Partition**

"Partition is the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interests therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed according to the respective interests. It is an action between tenants in common or joint tenants and may be effected voluntarily by mutual consent of the parties or by judicial order upon the application of one or more co-owners" (*Chiang v Chiang*, 147 AD2d 371, 373, 529 NYS2d 294 [1st Dept 1988] [internal quotations and citation omitted]).

"[A] court of equity has the inherent power to issue a decree of partition or require the sale of jointly owned property. It is also a generally held view that absent an express agreement

to the contrary, a testamentary restriction against partition, or extreme prejudice to a co-owner, a partition is a matter of right of a co-owner who no longer desires to hold or use the property in common” (*id.*).

The Court finds that partition is appropriate under these circumstances and plaintiff is entitled to summary judgment. Although plaintiff does not seek summary judgment in her notice of motion, she affirmatively seeks this relief in her moving papers (*see* NYSCEF Doc. No. 12, ¶ 11). There is no dispute that the parties jointly own the shares in the HDFC and that plaintiff, a joint tenant, no longer wants to keep her shares. Therefore, partition is the appropriate remedy. Defendant’s claim that plaintiff abandoned the apartment does not compel the Court to deny plaintiff’s motion. Plaintiff’s decision to live elsewhere (whether it was voluntary or forced) has nothing to do with her ownership interest. A joint property owner does not lose her property interest by not living in the property.<sup>1</sup> The Court also finds that the apartment must be sold and cannot be physically partitioned. The apartment is 450 square feet—it is not a property that can be readily divided, especially without the HDFC’s approval and compliance with the HDFC’s rules.

The Court will also conduct a hearing to determine to assess how the sale proceeds should be distributed between the parties. “It is axiomatic that in an action for partition the court may adjust the equities of the parties in determining the distribution of the sale proceeds” (*McKiver v Sarma*, 163 AD2d 721, 722, 558 NYS2d 997 [3d Dept 1990] [observing that although summary judgment obviated the need for a trial, the Supreme Court should have held a hearing on the equitable share of the net proceeds]). This hearing will include consideration of

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<sup>1</sup> While the Court recognizes that abandonment may result in the loss of an ownership interest under the doctrine of adverse possession, that is not applicable here as plaintiff commenced an action to get the property back in 2014 and the alleged abandonment did not satisfy the statutory period (*see Children’s Magical Garden v Norfolk St. Dev., LLC*, 164 AD3d 73, 80-81, 82 NYS3d 354 [1st Dept 2018]).

plaintiff's claim that she was wrongfully ousted from the property and defendant's insistence that plaintiff abandoned the apartment. It will also include exploration of who paid the monthly maintenance charges, taxes (if applicable) and any other monthly bills for the apartment during the key time period (from the ouster to the present). The Court must also assess whether there are any creditors who have liens on the property (see RPAPL 913).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted to the extent that the plaintiff is entitled to a partition and sale of the apartment and the Court will hold a hearing to determine the equitable distribution of the sale proceeds and whether any creditors have liens on the property; and it is further

ORDERED that the cross-motion by defendant for leave to amend is denied.

A pre-hearing conference will be held on September 9, 2019 at 10:00 a.m. The parties must be ready to discuss exhibits (please bring copies), witness lists and the rules of the HDPC for sales.

6/21/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE