

2nd Ave Holding 1 LLC v Lowenbraun
2020 NY Slip Op 30803(U)
March 16, 2020
Supreme Court, New York County
Docket Number: 162426/2019
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 162426/2019

2ND AVE HOLDING 1 LLC,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

NORMAN LOWENBRAUN, RENATA
LOWENBRAUN, WENDY LEWIT, LESLIE LEWIT
MILNER,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 4-30
were read on this motion for miscellaneous.

By order to show cause, defendants seek an order finding that real property known as
1306 Second Avenue, New York, NY is heirs property within the meaning of Real Property
Actions and Proceedings Law (RPAPL), issuing a notice to all parties identifying that plaintiff,
as alleged 16.667 percent owner of the property, has sought its partition by sale of defendants’
right to purchase all of plaintiff’s interest, and of the time and place of the statutorily-mandated
settlement conference, its purpose, and the requirements of RPAPL § 993. Plaintiff opposes.

I. PROCEDURAL BACKGROUND

On December 24, 2019, plaintiff commenced this action against defendants for partition
of the above-referenced property, having acquired from Guy Lewit, the brother of two of the
defendants, in exchange for \$1.2 million, a 16.667 percent interest in the property. Defendants
Lewit and Lewit Milner (Milner) each have a 16.667 interest in the property. The remaining 50
percent interest is held by defendant trust. Plaintiff alleges in its complaint that defendants “are

using the premises for their own purposes without collecting or paying rent and/or without accounting to [him] for the income of said property.” (NYSCEF 1). Plaintiff simultaneously filed a notice of pendency against the property. (NYSCEF 2).

II. DEFENDANTS’ CONTENTIONS (NYSCEF 4-20)

By deed dated October 2, 1973, title to the property was equally conveyed to Robert Lewit and Nathan Lowenbraun, individually. By deed dated December 3, 2009, Nathan Lowenbraun conveyed an undivided 38.1 percent interest of his 50 percent interest in the property to the 2009 Lowenbraun trust. By executor’s deed dated May 31, 2013, Guy Lewit, conveyed an undivided 16.667 percent interest in the property to each Lewit sibling, defendants Lewit and Milner, and to himself. By deed dated September 14, 2017, Nathan Lowenbraun and the 2009 trust together conveyed their interest in the undivided 50 percent interest to defendant trust. According to defendants, by virtue of these conveyances, they co-own the property as tenants in common. (NYSCEF 5, 6, 13-16).

By affidavit, defendant Milner states that she and the other defendants have collected rents from tenants at the property and rely on that income. She alleges that plaintiff’s principal, a developer and “claimed owner” of an adjacent property, “brought this partition action to force an involuntary sale of the Property . . .” which she characterizes as predatory. She recounts an unsolicited email dated June 28, 2018 by which plaintiff’s principal introduced himself as a “new neighbor” and developer of an adjacent property and asserts that he claimed in the email that the property in issue was worthless and could not be developed unless combined with an adjacent property. Thus, he maintained, the sole option available was to sell to him all interests in the property. Milner received many such emails from him. (NYSCEF 5).

Milner also describes how on October 17, 2018, plaintiff’s principal personally appeared

at her private residence and told her that he had purchased two buildings adjacent to the property which would be rendered valueless once his planned development is completed as it would dwarf the property. She also alleges that her brother had given defendants no notice of the sale of his interest in the property to plaintiff.

Defendants argue that RPAPL § 993 governs the circumstances in issue here as the property constitutes “heirs property” as it is held: “(i) by tenants in common with no agreement binding all co-tenants in the event of partition; (ii) by at least one co-tenant who acquired title from a relative; and (iii) 20% or more of the interests are held by co-tenants who are relatives.” They observe that each of the pertinent deeds is silent as to the form of the tenancy conveyed, resulting in the presumption that title was taken as tenants in common with undivided interests.

As the property is heirs property, defendants ask that the various requirements set forth in RPAPL § 993 become operative by entry of the appropriate orders.

III. PLAINTIFF’S CONTENTIONS (NYSCEF 26-30)

By affidavit, plaintiff’s principal alleges that defendants will receive a higher price for the property from him than from “a third party purchaser seeking to own and operate the premises ‘as is,’” and that he paid a “substantial premium” for his share as compared to what Guy would have received from a third party. As his purchase of Guy’s interest in the property was part of good faith attempts to acquire the others’ interests, he accuses defendants of seeking to punish plaintiff for those efforts.

Plaintiff’s principal also contends that defendants refused to allow him to manage the property jointly or to communicate with him, and that they have precluded him from participating in negotiations with the management company, new tenants, and brokers. He complains that plaintiff has thus received only \$20,000 for its one-sixth interest in the property,

and represents that he has offered \$9 million for the remaining five-sixths' interests, along with other offers he has made which, he asserts, are lucrative to defendants, such as structuring a "deal" that would "satisfy [them]" and offer to swap properties with them with the net effect of doubling their income and equity. He has also assertedly offered to exchange plaintiff's interest in the property solely for the air rights. Thus, plaintiff's conduct with respect to defendants is not predatory and is not the kind of conduct targeted by RPAPL § 993.

Given the "stalemate" between the parties, plaintiff seeks partition. Plaintiff's principal states that he does not intend to provide defendants with "anything less than fair market value . . ." Moreover, due to defendants' "delay in bringing suit in order to exhaust all other potential avenues for resolution," plaintiff is "confronted with an entirely new statutory scheme designed to curb abuses not present in the instant action," resulting in a possible significant financial loss.

In the alternative, plaintiff asks that the price it paid for its share of the property and the price it has consistently offered to defendants be considered at any settlement conference held under the statute or in connection with the determination of the property's value pursuant to the statute.

IV. ORAL ARGUMENT

At oral argument, defendants requested an additional order providing that "there can be no such lien placed on a property during the pendency of this action." (NYSCEF 31).

V. DISCUSSION

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 993(3)(b):

In any action to partition real property, the court shall determine, after notice and the right to be heard afforded to each party, whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record.

"Heirs property" means real property held in tenancy in common which satisfies all of the

following requirements as of the filing of a partition action:

- (i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;
- (ii) any of the co-tenants acquired title from a relative, whether living or deceased; and
- (iii) any of the following applies:
 - (A) twenty percent or more of the interests are held by co-tenants who are relatives;
 - (B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;
 - (C) twenty percent or more of the co-tenants are relatives of each other; or
 - (D) any co-tenant who acquired title from a relative resides in the property.

(RPAPL § 993[2][e]).

The legislative history of the statute reflects the following justification for it:

As a general rule under New York law, where multiple owners hold real property as tenants in common, any one co-owner can try to force the sale of the property by filing a partition action in court under RPAPL article nine. In the supporting memoranda, the Legislature observed that

[i]n recent years, predatory real estate speculators have taken advantage of New York's laws governing partition actions by purchasing a stake in a residential property - usually after a number of family members have inherited the property - and then using that ownership stake to file a partition action to dispossess the family of the property through a forced sale, often for pennies on the dollar relative to the actual value of the property. Lower- and middle-class families are particularly susceptible to these types of schemes, as they often do not engage in the kind of sophisticated estate planning that could prevent predatory partitioning actions.

This legislation would address the issue of predatory partition actions, while preserving a co-owner's right to sell his or her share of the property. The Act would only apply in situations where at least one of the co-owners has inherited their property interest from a relative and there is no written agreement otherwise governing partition among the owners.

Notwithstanding the legislative intent, and while plaintiff allegedly offered defendants, members of "a family of significant means," well above fair market value for the mixed-use property where not one of them lives, defendants indisputably satisfy each and every statutory requirement for finding that the property is heirs property. Thus, there is an insufficient basis for determining otherwise. Absent a formal written motion, defendants' request concerning a lien cannot be considered.

The statute requires that once it is determined that the property is heirs property, the property must be partitioned “in accordance with this section unless all of the co-tenants agree in a record.” RPAPL § 993(3)(b). As it is not disputed that all co-tenants do not agree in a record and as plaintiff has commenced a partition action, pursuant to subdivision 5(a), the court must hold a conference within 60 days after the date of the filing of a request for judicial intervention, or on a date agreed to by the parties. Here, the RJI was e-filed on January 31, 2020, and March 31, 2020 is the 60th day.

In light of the worldwide COVID-19 (coronavirus) crisis and the updated operational protocols for the trial courts that take effect as of today at 5 pm and include the “postponing [of] all nonessential” court functions (see Memorandum of Lawrence K. Marks, dated March 15, 2020), the scheduling of the settlement conference mandated by RPAPL § 993(5)(a), is postponed until further notice, as are all other statutorily mandated proceedings.

Accordingly, it is hereby

ORDERED, that defendants’ motion for an order finding that the property is heirs property is granted; and it is further

ORDERED, that proceedings required by the statute are stayed pending the formal resumption of nonessential court functions, when directed by the Unified Court System.

3/16/2020

DATE

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BARBARA JAFFE, J.S.C.

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