

**Accurso v Raucci**

2020 NY Slip Op 32575(U)

August 4, 2020

Supreme Court, Kings County

Docket Number: 500488/2020

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

\_\_\_\_\_ X

**TRACEY ACCURSO,**

**Plaintiff,**

**-against-**

**PASQUALE RAUCCI, ANTHONY RUFFINO,  
DAWN RUFFINO and RUFFINO LLC,**

**Defendants.**

\_\_\_\_\_ X

**DECISION / ORDER  
Index No. 500488/2020  
Motion Seq. No. 1  
Date Submitted: 7/23/20**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss*

| <b>Papers</b>   | <b>NYSCEF Doc.</b> |
|---|--------------------|
| Notice of Motion, Affirmation and Exhibits Annexed..... | <u>18-23</u>       |
| Affirmation in Opposition and Exhibits Annexed.....     | <u>24-28</u>       |
| Reply Affirmation.....                                  | <u>29</u>          |

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

This is an action for partition, commenced January 8, 2020. This is the only cause of action in the complaint. All three individual defendants move, pre-answer, to dismiss the complaint as against them for failing to state a cause of action (CPLR 3211[a] [7]) and founded on documentary evidence (CPLR 3211 [a] [1]). For the reasons which follow the motion is granted and the complaint is dismissed.

Plaintiff is the surviving daughter of Emily Accurso. According to the documents in the motion papers, mostly deeds which have been recorded, Emily Accurso transferred her

interest in the property known as 81 Woodhull Street, Brooklyn, NY to her two brothers in 1994 to enable them to obtain a mortgage; apparently, her credit was not good, so a bank asked that she be removed from the deed so that her two brothers could obtain a mortgage. The property appears to be a four-family house. Simultaneously with her execution of a deed to her brothers, the three siblings entered into a contract, duly signed and notarized (E-File Doc 27), which states that the brothers will put Emily Accurso back on the deed when they are able to do so. It also states that her written consent is required for any sale and, upon the sale, she is to receive one-third of the "net profits."

In 1999, one brother transferred his interest to the other, defendant Pasquale Raucci. It seems the mortgage was subsequently paid off, but Emily Accurso was not put back on the deed. Emily Accurso died in 2015, intestate, leaving two children, plaintiff and a son, Louis Accurso. In 2016, Pasquale Raucci sold the house to defendants Anthony and Dawn Ruffino but did not give one-third of the "net profits" to Emily Accurso's two children. The Ruffinos then transferred the property to an LLC, the non-moving defendant Ruffino LLC, in 2017. Plaintiff recently commenced this partition action and filed a Notice of Pendency against the property.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

Here, the court finds that, accepting every fact alleged as true, plaintiff cannot maintain a partition action. She is not a party listed in Real Property Actions and

Proceedings Law § 901. Further, once the house was conveyed to bona fide purchasers for value without notice, plaintiff's ability to seek partition terminated. This action is not permitted by New York's traditional partition statutes, nor the recently adopted "Uniform Partition of Heirs Property Act," RPAPL § 993.

Plaintiff can bring an action for breach of contract against Pasquale Raucci, on behalf of her mother's estate, once she is appointed Administrator of the estate. There is a remedy, but that remedy is not to have a court-ordered sale of the house, which is what a traditional partition action is for.

In addition, "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430, 676 N.E.2d 1178, 654 N.Y.S.2d 335 [1996] [internal citations omitted]). Here, Ruffino LLC has answered the complaint, and is represented by different counsel than movants. The movants all seem to be represented by the attorney assigned by the Ruffinos' title insurance company. This partition action must be dismissed as against defendant Ruffino LLC, as well.

Accordingly, it is

**ORDERED** that the motion is granted and the complaint is dismissed as against all defendants. The Notice of Pendency, dated January 7, 2020, filed by plaintiff against the property known as 81 Woodhull Street, Brooklyn, New York, Block 359, Lot 38 in Kings County is hereby canceled, and the County Clerk is directed to mark her records accordingly; and it is further

**ORDERED** that defendants are awarded the costs and disbursements of this action, as taxed by the Clerk, in connection with the entry of judgment dismissing this action

pursuant to this order.

This constitutes the Decision and Order of the Court.

Dated: August 4, 2020

**ENTER:**



**Hon. Debra Silber, J.S.C.**

**HON. DEBRA SILBER  
JSC**