

Anthony v Anthony

2020 NY Slip Op 32803(U)

August 25, 2020

Supreme Court, Kings County

Docket Number: 525448/19

Judge: Karen B. Rothenberg

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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: TRIAL TERM PART 35 X
VERNON A. ANTHONY,

Plaintiff,

Index No: 525448/19

-against-

DECISION AND ORDER

ROBERT S. ANTHONY,

Defendant,

X

Recitation as required by CPLR 2219(a), of the papers considered in plaintiff's order to show cause for injunctive relief and motion for a default/summary judgment pursuant to RPAPL §901(1) for partition and sale.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1; 2
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	3
Reply Papers.....	4

Upon the foregoing cited papers, the Decision/Order on this motion:

In this partition action between siblings, plaintiff Vernon A. Anthony [Vernon] moves by order to show cause [motion sequence no. 1] for an order (1) pursuant to CPLR 6301 to enjoin and restrain the defendant Robert S. Anthony [Robert] from pledging, encumbering, dissipating, transferring or in any way clouding the title to the property known as Unit 1, 46 President Street, Brooklyn, New York 11231, held by the parties as tenants in common, and (2) compelling Robert to pay the real estate taxes, common charges, repair and maintenance costs due under the stipulation of settlement dated December 28, 2018, plus \$3,000 use and occupancy for the exclusive possession of the unit. Vernon separately moves [motions sequence no. 2] for an order pursuant to CPLR 3215 or, in the alternative, CPLR 3212, granting him judgment against Robert on his cause of action for partition and sale of the subject unit.

The subject unit was originally owned by Vernon and his father Alfred Anthony [Alfred] by deed dated July 11, 1986. Upon the death of Alfred, the parties' mother, Helen Anthony [Helen], inherited her husband Alfred's 50% interest in the property by operation of law. After Helen's death on August 23, 1990, Vernon, Robert and their non-party brother Arthur J. Anthony [Arthur], inherited their mother Helen's 50% interest in

the property as her heirs at law. On or about May 17, 1999, Vernon, Robert, and Arthur conveyed their interest in the property to Vernon and Robert as tenants in common.

In his affidavits in support of his respective motions, Vernon states that he never lived in the unit but made most of the mortgage payments. Vernon further states that Robert has had exclusive use and occupancy of the unit since 1991, and it was agreed that Robert would pay all of the carrying charges, including the common charges, real estate taxes, maintenance and repairs for the unit. Vernon claims that or about January 2012, Robert ceased making any contributions or payments for the unit and in 2015, the Board of Managers of the condominium commenced a foreclosure action for the outstanding common charges. Vernon states that he and Robert entered into a stipulation with the condominium settling the matter for \$38,000, which he, himself, ultimately paid in full. Vernon further states that he continues to pay the common charges for the unit with no contribution from Robert. Vernon claims that as of March 18, 2020 he has expended a total of \$86,405, including \$3,500 to settle a property damage claim involving a neighbor. Vernon further claims that there are unpaid real estate taxes due, totaling \$11,822.05.

In his order to show cause, Vernon seeks a preliminary injunction enjoining Robert from clouding the title to the subject premises. In addition, Vernon seeks \$3000 in use and occupancy based on Robert's exclusive possession of the unit. In a separate motion, Vernon seeks a default judgment against Robert due to his failure to formally answer the complaint in this matter or, in the alternative, an award of summary judgment, if the court considers a letter Robert sent to Vernon's counsel as an appearance, for partition and sale. Vernon also seeks to be reimbursed for the monies he expended for the unit as well as 50% of the proceeds of the sale.

Robert's letter, which the court will deem a pro-se answer/opposition in this matter, states that he has repeatedly offered to resume paying the common charges, all other related expenses, as well as to compensate Robert for his recent expenses. Robert states that he moved into the subject unit to take care of the parties' younger brother, who suffers from cerebral palsy and is partially paralyzed, after the deaths of their parents in 1990. Robert further states that he has lived with his younger brother for 29 years and for most of those years covered all the condominium expenses with no financial contribution from Vernon. Robert contends that he is the victim of racial harassment by his neighbors which caused him difficulty in making an income. He states, however, that as of last year his financial condition has vastly improved and he now has regular income, collecting social security payments as well as monies from freelance work, which are enough to cover the carrying charges each month. Robert states that he has the ability to maintain the unit, compensate Vernon for his expenses, and cause him no future expenses. Robert seeks a payment plan to resolve this matter and asserts that a sale would cause him to be homeless.

“A person holding and in possession of real property as 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]). Here, Vernon establishes his prima facie entitlement to judgment as a matter of law on his cause of action for partition of the subject condominium unit by submitting, *inter alia*, a copy of the deed to the property indicating that he is a tenant in common with Robert and that he owns a 50% interest therein (*see Holley v Hinson-Holley*, 101 AD3d 1084 [2d Dept 2012]). Vernon further establishes, prima facie, that a physical partition of the condominium unit cannot be made without great prejudice to the owners (*see Galitskaya v Presman*, 92 AD3d 637 [2d Dept 2012]).

In opposition, the defendant fails to establish that the equities favor dismissal of the action (*see Graffeo v Paciello*, 46 AD3d 613 [2d Dept 2007]). Although the court is sympathetic to Robert’s circumstances, and would love to see the parties negotiate a settlement of this matter, equity does not warrant denial when the defense amounts to “nothing more than the adverse consequences which would befall defendant if partition [is] ordered” (*Manganiello v Lipman*, 74 AD3d 667 [1st Dept 2010]).

In light of the disagreement as to the expenses paid by each of the parties, prior to the entry of an interlocutory judgment directing the sale of the subject property, an accounting must be made to determine the parties’ respective interests in the property (*see Wolfe v Wolfe*, 187 AD2d 628, 629 [2d Dept 1992]). An accounting is a “necessary incident” of a partition action (*Tedesco v Tedesco*, 269 AD2d 660, 661 [3d Dept 2000]), and works to ensure that the “parties’ rights are fixed in such manner that a decree may work full and complete justice between [them]” (*Grossman v Baker*, 182 AD2d 1119, 1119 [4th Dept 1992]).

A claim for use and occupancy is not established. A tenant in common is generally not liable to another for use and occupancy, in the absence of an agreement or ouster (*see Jemzura v Jemzura*, 36 NY2d 496 [1975]). Here, Vernon does not demonstrate an ouster and his affidavit does not sufficiently demonstrate the existence of an agreement between the parties that required Robert to pay use and occupancy for the subject unit (*see Peretta v Perretta*, 143 AD3d 878 [2d Dept 2016]).

Lastly, in order to maintain the status quo during the pendency of this matter, a preliminary injunction is warranted enjoining both parties from pledging, encumbering, dissipating, transferring or in any way clouding the title to the subject unit.

Accordingly, it is hereby

Ordered, that the motion for summary judgment seeking a partition and sale of the subject property is granted to the extent that a Referee is appointed to conduct an accounting, and it is further

Ordered, that Charles M. Sporn, Esq. whose office is located at 960 Woodland Avenue, Plainfield, New Jersey 07060, (917) 836-1500 is appointed Referee with the power to hear and report as to the rights, shares and interests of the parties with respect to the subject property, and it is further

Ordered, that the Referee shall be empowered to hold hearings and/or rely upon written submissions regarding any issues related to the completion of his accounting including, but not limited to, ascertaining whether the property is encumbered by a mortgage and, if so, to compute the amount due for principal, interest and other disbursements under the terms of said mortgage; the expenditures made by the parties for property taxes, mortgage payments, common charges, insurance costs, repair, maintenance and improvements costs; and as to income earned, if any, and it is further

Ordered, the Referee shall also ascertain and report whether there is any creditor, not a party, who may have a lien on the undivided share or interest of any party, and it is further

Ordered, that the Referee's fee and all costs and expenses incurred in the execution of his responsibilities shall be shared equally by the parties, and it is further

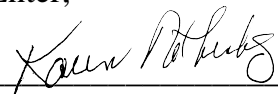
Ordered, that the order to show cause seeking a preliminary injunction pursuant to CPLR 6301 is granted in that **both** parties are enjoined and restrained from pledging, encumbering, dissipating, transferring or in any way clouding the title to the property known as Unit 1, 46 President Street, Brooklyn, New York 11231 (Lot and Block), and it is further

Ordered, that the portion of the order to show cause seeking an order awarding use and occupancy is denied.

This constitutes the decision/order of the court.

Dated: August 25, 2020

Enter,



Karen B. Rothenberg
J.S.C.