

**Baucom v Young**

2020 NY Slip Op 33826(U)

November 9, 2020

Supreme Court, Kings County

Docket Number: 503477/2018

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  
CHERYL T. BAUCOM,

Plaintiff,

Index No: 503477/2018

-against-

DECISION AND ORDER

DEBORAH YOUNG and CHARLENE BAUCOM,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in plaintiff's motion for a summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1-10
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	11-16; 17-19
Reply Papers.....	20-21

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

In this action to determine claims to certain real property and for partition and sale, plaintiff, Cheryl T. Baucom, moves for an order (1) pursuant to CPLR 3212 granting summary judgment in her favor against the defendants, Deborah Young [Young] and Charlene Baucom [defendant Baucom], on her cause of action for a judgment declaring that plaintiff is a one-third owner of the premises known as 542 MacDonough Street, Brooklyn, Block 1678, Lot 26, (2) for a judgment of partition and sale of the subject premises, (3) pursuant to CPLR 3211(b) dismissing the affirmative defenses alleged in the defendants' verified answers, (4) setting this matter down for an accounting to determine the respective financial interest of each party to the proceeds of the sale, and (4) after hearing on the respective financial issues of the parties, setting this matter down for a sale at public auction.

This action arises out of a dispute among siblings over the real property of their deceased mother, Dorothy Baucom, who died intestate on January 24, 2013. The parties are the only heirs of the decedent whose main asset was the subject property. It is alleged that upon the death of the decedent, Young applied for letters of administration through the Surrogate's Court in Kings County, submitting a petition which included a document purporting to contain plaintiff's signature waiving and consenting to Young's

appointment as administrator, but which she never signed. It is also alleged that the letters restricted Young from collecting and distributing assets in excess of \$499,000 without further court order. It is further alleged that despite the restriction placed upon the letters, and without any approval from the court, Young executed an Administrator's Deed dated January 29, 2014 purporting to transfer the subject property to herself, individually, and to defendant Baucom, despite plaintiff's one-third interest. This deed was signed by both Young, in her individual capacity, and defendant Baucom on March 11, 2014 and was recorded on April 22, 2014.

Plaintiff describes the property as a three-story building, with no certificate of occupancy, which she claims is a two-family residence based on the tax rolls for the property. Plaintiff states that the configuration of the premises is that of two apartments – one apartment, which is occupied by defendants, consists of a kitchen, bathroom, dining room, and living room located on the first floor, with an interior staircase leading to three bedrooms and one bathroom on the second floor, and a second apartment on the third-floor, which is tenant occupied, consisting of a kitchen, bathroom, living room and bedroom.

Plaintiff contends that the parties are tenants in common with each possessing a fee simple absolute of a one-third interest in the subject property. Plaintiff further contends that a sale of the property is warranted because the configuration of the property makes physical partition not feasible.

In opposition, counsel for Young argues that plaintiff's motion for summary judgment is premature as discovery is not complete. Specifically, it is contended that there are issues of fact regarding the deed's execution and the circumstances surrounding same, which should be remedied by way of deposition and discovery. Additionally, counsel argue that dismissal of defendants' affirmative defenses is not warranted as they "involve issues of credibility and competing versions of the factual events leading up to the transfer of the property." Counsel and guardian ad litem for defendant Baucom additionally argues that the granting of a partition and sale would greatly prejudice her client who is developmentally disabled and resides at the subject property with Young as her caretaker. Counsel/guardian ad litem further argues that if the subject property is sold, her client will be forced into a group home and lose valuable services that she needs.

In a factual affidavit submitted in opposition to the motion, Young states that her petition to become administrator of her mother's estate was granted on July 12, 2013. She later entered into a loan modification agreement for the subject property and also entered into an agreement<sup>1</sup> with plaintiff Baucom, to put the subject property in Young and

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<sup>1</sup> Although Young questions plaintiff's mental fitness and her competency to maintain this action, she presents nothing but unsubstantiated claims regarding Baucom's mental condition. It is also noted that

defendant Baucom's names alone. On March 11, 2014, Young executed the deed transferring ownership of the premises to herself and defendant Baucom. Young avers that since becoming owner of the property, she has maintained it and made all payments including mortgage, utilities repairs and upkeep. Young further states that she is defendant Baucom's sole caregiver and selling the property would force defendant Baucom to find alternative living arrangements which would severely prejudice her.

In a reply affidavit, plaintiff states she never spoke to Young about the ownership of the subject property either before or after their mother's passing. Plaintiff further states that she never entered into an agreement either verbally or in writing to give up her inheritance. Plaintiff also states that she did not receive any money from anyone with respect to her inheritance.

### *Declaratory judgment*

It is well settled that when a person who holds an interest in real property dies intestate, his/her interest in the real property automatically vests by operation of law upon his/her distributees as tenants in common (*see Matter of Blango*, 166 AD3d 767 [2d Dept 2018]). Pursuant to New York Estates, Powers, and Trusts Law §4-1.1 if a decedent dies intestate, his/her property is distributed to his/her spouse and issue (see EPTL §4-1.1[a][1]). If the decedent has no spouse, as in the present case, then his/her issue takes all of his/her property (see EPTL §4-1.1[a][4]). Here, it is undisputed that the parties are the decedent's sole heirs and that title to the subject property automatically vested in them as tenants in common upon the decedent's death. Accordingly, plaintiff makes her prima facie showing of entitlement to a declaration that she is a one-third owner of the subject property (*see Kraker v Roll*, 100 AD2d 424 [2d Dept 1984]).

In opposition, defendants fail to raise a triable issue of fact as to plaintiff's ownership interest. The statute of frauds provides that in order to transfer an ownership interest in real property, there must be a deed, or other "conveyance in writing" (*see* General Obligations Law §5-703[2]; *Alayoff v Alayoff*, 112 AD3d 564 [2d Dept 2013]). Here, defendants present no proof of a written agreement between the parties. Moreover, any oral agreement between Young and plaintiff, wherein plaintiff agreed that title to the subject property be placed in Young and defendant Baucom's names, alone, thereby transferring her ownership interest in the subject property to her siblings, falls squarely within the statute of frauds and is unenforceable (*see Lowinger v Lowinger*, 287 AD2d 39 [1<sup>st</sup> Dept 2001]). Further, contrary to defendants' contention, the plaintiff's motion for summary judgment is not premature, as defendants fail to show that discovery might lead

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Young makes no mention of plaintiff's capacity when discussing plaintiff's alleged agreement to transfer her interest in the subject property to the defendants.

to relevant evidence or that the facts essential to justify opposition to the motion are exclusively with the knowledge or control of the plaintiff (*see Oppedisano v Arnold*, 143 AD3d 873 [2d Dept 2016]).

Plaintiff also demonstrates prima facie entitlement to the dismissal of defendants' affirmative defenses of unclean hands, estoppel, laches, waiver, and 'relinquishment'. Contrary to the defendants' contentions, these affirmative defenses, which are based on an unenforceable oral agreement for the transfer of plaintiff's interest in the subject property to defendants, are without merit as a matter of law (*see generally Towpash v Towpash*, 119 AD2d 567 [2d Dept 1986]).

### *Partition and sale*

"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, plaintiff establishes her prima facie entitlement to judgment as a matter of law on her cause of action for partition of the subject property, as it is undisputed that the plaintiff, by operation of law, is a one-third owner of the subject property and is tenant in common with the defendants (*see Holley v Hinson-Holley*, 101 AD3d 1084 [2d Dept 2012]).

In opposition, the defendants fail to demonstrate the existence of a triable issue of fact sufficient to defeat the plaintiff's motion (*see Donlon v Diamico*, 33 AD3d 841 [2d Dept 2006]). Contrary to defendants' contentions, the equities do not favor dismissal of the action (*see Graffeo v Paciello*, 46 AD3d 613 [2d Dept 2007]). Although the court is sympathetic to defendant Baucom's circumstances, and would prefer to see the parties reach a settlement, equity does not warrant denial of a partition action based solely on "the adverse consequences which would befall defendant if partition [is] ordered" (*Manganiello v Lipman*, 74 AD3d 667 [1st Dept 2010]). Moreover, although defendant Baucom's counsel/guardian ad litem suggests that her client will be forced into a group home and will lose valuable services if a sale is ultimately ordered, she makes no showing as to the services her client currently receives and would lose by having to relocate. Further, Young, who is defendant Baucom's sole caretaker, makes no indication that defendant Baucom would be forced into a group home if a sale occurs.

However, before a partition or sale may be directed, the issues of the interests of the parties and whether partition may be had without a great prejudice must first be determined (*see Wolfe v Wolfe*, 187 AD2d 628, 629 [2d Dept 1992]). Because partition is an equitable remedy, this court has the authority to adjust the rights of the parties "so each receives his or her proper share of the property and its benefits" (*Brady v Varrone*, 65 AD3d 600, 602 [2d Dept 2009]). Further, 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]).

The court shall appoint a referee to hear and report on the rights, shares, and interests of each party in the subject property, taking into account any income earned, and costs and expenses incurred, in connection with said property (*see Khotylev v Spektor*, 165 AD3d 1088 [2d Dept 2018]) and to make a finding as to whether physical partition or sale is appropriate (*see Hales v Ross*, 89 AD3d 1261 [3d Dept 2011]).

Accordingly, it is hereby

Ordered, that plaintiff’s motion for summary judgment for a declaration in her favor that she is a one-third owner of the subject property is granted, and it is further

Ordered, that the administrator’s deed transferring title to the subject property to Young and defendant Baucom, recorded on April 22, 2013, is deemed null and void, and it is further

Ordered, that plaintiff’s motion pursuant to CPLR 3211(b) to dismiss the defendants’ affirmative defenses is granted, and it is further

Ordered, that plaintiff’s 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 Richard Klass, Esq., whose office is located at 16 Court Street, Fl 28, Brooklyn, New York 11241, 718-643-6063, [Richklass@courtstreetlaw.com](mailto:Richklass@courtstreetlaw.com), 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, as well as to report whether the property is so circumstanced that a partition of said property cannot be made with great prejudice to the owners, 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 may order an appraisal without further order of the court unless the parties, by agreement, hire one appraiser, the cost of which shall be shared equally by the parties, or separately hire their own independent appraisers and present such appraisals to the Referee, 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

This constitutes the decision/order of the court.

Dated: November 9, 2020

Enter,



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Karen B. Rothenberg  
J.S.C.