

DeSilva v DeSilva
2021 NY Slip Op 33001(U)
December 28, 2021
Supreme Court, Kings County
Docket Number: Index No. 511815/2018
Judge: Ingrid Joseph
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At an I.A.S. Term, **Part 83** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of December, 2021.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
EDRISS DESILVA, LEONARD DESILVA,
and FREDERICK DESILVA,

Plaintiffs,

Index No.: 511815/2018

-against-

ORDER AND JUDGMENT

EDWARD DESILVA,

Defendants.

-----X
The following e-filed papers considered herein:

NYSCEF E-filed docs

Notice of Motion/Affirmation in Support/Exhibits Annexed..... 41 - 45

In this action for the partition or sale of real property, plaintiffs, Edriss DeSilva, Leonard DeSilva and Frederick DeSilva (referred to collectively as “plaintiffs”), move by Notice of Motion (Motion Seq. 3) for an order confirming the report of court-appointed Referee, Zvi A. Storch, Esq. (“Referee Storch”), and for a final judgment confirming their respective right and share of interest in the property described in the Complaint as 455 East 4th Street, Brooklyn, New York (Block 5356, Lot 53), and an order directing the sale of such property at public auction and the appointment of a Referee to conduct the auction sale.

UPON review of the Order Appointing Referee dated May 28, 2019 (Montelione, J.), wherein the court granted default judgment in favor of plaintiffs on their First through Fifth Causes of Action against non-appearing defendant, Edward DeSilva (“defendant”), including the partition and sale of the subject property, an accounting, damages for waste, breach of fiduciary duty, and a temporary restraining order against the defendant, and further, appointed, Zvi A.

Storch, Esq., as Referee in accordance with RPAPL § 911, to conduct a hearing and remit to the court a report regarding the parties' respective rights, shares and interest in the property, whether there exist any liens on the undivided shares of interest of any party, and to sever the defendant's interest as a joint tenant of plaintiffs upon the Referee's execution and delivery of a deed to the subject property, and

Upon review of the Referee's Oath and Report pursuant to RPAPL §§ 911 and 913, both dated August 11, 2021, wherein Referee Storch, respectfully reports to the court, that the parties were duly notified and given an opportunity to be heard at such hearing and did submit documents for Referee Storch's consideration, with the assistance of their respective attorneys, and

NOW, the motion of plaintiff's attorney, Naomi Zeltser, Esq., of Zeltser Law Group, PLLC, is granted on default, to the extent provided herein, and it is

ORDERED, ADJUDGED AND DECREED, that the Report of Referee Zvi S. Storch, Esq., dated August 11, 2021, is confirmed, and it is further

ORDERED, ADJUDGED AND DECREED, that in accordance such Referee Report, the parties' herein, Edriss DeSilva, Leonard DeSilva, Frederick DeSilva, and Edward DeSilva, each own twenty-five percent (25%) interest in the property known as 455 East 4th Street, Brooklyn, New York (Block 5356, Lot 53), as provided in the deed dated January 23, 2003 and recorded at the New York City Department of Finance Office of the City Register on March 6, 2003, City Register File No. 2003000036498, documenting the conveyance of the prior owners, Mark Tenenbaum and Mary Tenenbaum, also known as Ann Halliwell, of their ownership interest in the subject property to Edriss DeSilva, Leonard DeSilva, Frederick DeSilva, and Edward DeSilva, as joint tenants with rights of survivorship; and it is further

ORDERED, ADJUDGED AND DECREED, that the subject property is so circumstanced that a partition thereof cannot be made without great prejudice to the parties and a sale of the premises is required, because the property in issue is improved with a three-family residential building upon the predominate portion of the land on which it is situated and cannot be subdivided into equal shares among the four owners thereof, while simultaneously retaining its value and highest and best use; and it is further

ORDERED, ADJUDGED AND DECREED, that a title search revealed a prior encumbrance upon the subject premises, pursuant to a mortgage against the premises and note of \$465,200 between mortgagee, HSBC Mortgage Corporation (USA) and mortgagors, Edriss DeSilva, Leonard DeSilva, Frederick DeSilva, and Edward DeSilva, as allegedly assigned by HSBC Mortgage Corporation (USA) to HSBC Bank, USA, N.A. on August 24, 2011, and further alleged assignments, to wit: from HSBC Bank, USA, N.A. to Federal National Mortgage Association on November 19, 2015, and Federal National Mortgage Association to MTGLQ Investors LP on July 7, 2017, and pursuant to the Order and Judgment (Montelione, J.) dated September 1, 2020, Index No. 509339/2019, Supreme Court, Kings County, that the mortgage lien/encumbrance held by MTGLQ Investors LP (dated July 7, 2017 and recorded on July 11, 2017 at CRFN: 2017000253523) is cancelled and discharged of record against the property known as 455 East 4th Street, Brooklyn, New York (Block 5356, Lot 53), and it is further

ORDERED, ADJUDGED AND DECREED, that there are no other creditors, who are not a party to this action, with a lien on the undivided share of interest of any party in the subject property, except Environmental Control Board Fines of \$650.00; Real Property Taxes of \$9,680.76; Water Bills of \$8,960.85; and a Money Judgment solely against plaintiff, Leonard DeSilva, in the amount of \$1,569.49, all of which shall be paid from the proceeds of the public auction, together with any additional sums due on outstanding water bills and tax bills, the

referee's fee, and other customary closing costs not accounted for in the instant order and judgment, except the personal debt of Leonard DeSilva of \$1,569.49, which shall be paid directly from his proportionate share of the proceeds from the public auction sale; and it is further

ORDERED, ADJUDGED AND DECREED, that the entirety of plaintiffs' causes of action, as asserted in the Complaint, including plaintiffs' claims for an accounting and damages for waste, are hereby resolved provided that proceeds from the public auction sale are sufficient to reimburse each plaintiff (Edriss DeSilva, Leonard DeSilva, Frederick DeSilva) the sum of \$30,000, which shall be deducted from and charged to the sum that defendant, Edward DeSilva, would otherwise be entitled to receive based upon his 25% ownership interest, after the outstanding water bill and property taxes, transfer tax, closing costs, and other customary fees are paid from the proceeds of the sale, as noted *supra*; and it is further

ORDERED, ADJUDGED AND DECREED, that sale of the subject property shall occur within one-hundred twenty (120) days from the date of the instant Order and Judgment, in one parcel, at a public auction at the Supreme Court, Kings County, 360 Adams Street, Brooklyn, New York 11201 at a date and time to be arranged and advertised by plaintiffs, by and under the direction of Zvi A. Storch, Esq., 26 Court Street, Brooklyn, New York 11242, Phone: 718-404-9101, Ext. 101, email: zvi@storchlawpc.com, who is hereby appointed Referee for that purpose; that said Referee give public notice of the time and place of sale in accordance with RPAPL § 231 in Brooklyn Eagle; and it is further

ORDERED, ADJUDGED AND DECREED, that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2(c) ("Disqualifications from appointment") and §36.2(d) ("Limitations on appointments based upon compensation"); and if the Referee is

disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify this court; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, ADJUDGED AND DECREED, that if the Referee does not conduct the sale within 120 days of the date of this Order and Judgment, in accordance with CPLR § 2004, the time fixed herein is extended for the Referee to conduct the sale, as soon as reasonably practicable; and it is further

ORDERED, ADJUDGED AND DECREED, that the subject property is to be sold in one parcel in “as is” physical order and condition, subject to any condition that an inspection of the property would disclose; any state of facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the subject property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL §1354; any equity of redemption of the United State of America to redeem the property within 120 days from the date of sale; and any rights pursuant to CPLR §§ 317, 2003, and 5015, or any appeal of the underlying action, and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee, in cash, certified check, or bank check, ten percent (10%) of the sum bid; and it is further

ORDERED, ADJUDGED AND DECREED, that, in the event the first successful bidder fails to execute the Terms of Sale immediately following the bidding upon the subject property or fails to immediately pay the ten percent (10%) deposit as required, the property shall immediately and on the same day be re-offered at auction; and it is further

ORDERED, ADJUDGED AND DECREED, that the closing of title shall be held no later than 30 days after such sale unless otherwise stipulated by all parties to the sale; and it is further

ORDERED, ADJUDGED AND DECREED, that after the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL §1353 and the Terms of Sale, which shall be deemed a binding contract; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Referee, on receiving the proceeds of such sale, shall forthwith pay therefrom, in accordance with their priority according to law, taxes, assessments, sewer rents, and water rates, which are or may become liens on the property at the time of sale, with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Referee shall then deposit the balance of said proceeds of sale in his own name as Referee in the appropriate escrow account and shall thereafter, make the following payments in accordance with RPAPL § 1354, as follows:

FIRST: The Referee's statutory fees for conducting the sale, in accordance with CPLR § 8003(b), not to exceed \$2,500, provided the sale price exceeds \$50,000, otherwise, the Referee's statutory fee is \$750.00 and further, the parties shall compensate the Referee the sum of \$750.00 for each adjournment or cancellation, unless the Referee caused the delay;

SECOND: All taxes, assessments, and water rates bills that are that are

outstanding liens upon the premises, as noted above, and any other amounts due in accordance with RPAPL §1354(2). The Purchaser shall be responsible for interest and penalties due on any real property taxes accruing after the auction sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The Purchaser shall hold the Referee harmless from any such penalties or fees assessed;

THIRD: The expenses of the sale and the advertising expenses as shown on the bills presented and certified by said Referee to be correct, duplicate copies of which shall be annexed to the report of sale;

FOURTH: The Referee shall then divide the remaining proceeds by four (4), then pay the sum of \$1,569.49 to the creditor of record from Leonard DeSilva's share and deduct from defendant, Edward DeSilva's share the total sum of 90,000, which shall be paid in three equal parts of \$30,000 to each plaintiff, Edriss DeSilva, Leonard DeSilva and Frederick DeSilva; then

FIFTH: The proceeds from the public auction sale, as reconciled in accordance herewith, to each party, and it is further

ORDERED, ADJUDGED AND DECREED, that all expenses of recording the Referee's deed, including real property transfer tax, which is not a lien upon the property at the time of sale, shall be paid by the purchaser, not by the Referee from sale proceeds, that any transfer tax shall be paid in accordance with Tax Law §1404; and it is further

ORDERED, ADJUDGED AND DECREED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants in this action, all

persons claiming through them, and any person obtaining an interest in the property after the filing of the Notice of Pendency are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the subject premises; and it is further

ORDERED, ADJUDGED AND DECREED, that within thirty days after completing the sale and executing the proper conveyance to the purchaser, unless the time is extended by the Court, the Referee shall file with the County Clerk a report under oath of the disposition of the proceeds of the sale in accordance with RPAPL § 1355(1); and it is further

ORDERED, ADJUDGED AND DECREED, that if the purchaser or purchasers at the public auction sale default(s) upon the bid and/or the Terms of Sale, the Referee may place the property for resale without prior application.

This constitutes the Decision, Order and Judgment of the court.

ENTER,


HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**