

459 Wash. LLC v Atkins
2022 NY Slip Op 32417(U)
July 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 522388/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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**459 WASHINGTON LLC, EMERSON ATKINS,
and KASAN BRYANT,**

Plaintiffs,

-against-

EKOYO ATKINS,

Defendant.

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DECISION / ORDER

Index No.522388/2019

Motion Seq. #2

Recitation, as required by CPLR 2219(a) of the papers considered in the review of plaintiffs' motion for summary judgment and related relief

Papers	NYSCEF Doc
Notice of Motion and Affidavit Annexed.....	<u>16-29</u>
Answering Affidavits.....	<u>32-36</u>
Reply Affidavits.....	<u> </u>

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

Plaintiffs move, in this partition action regarding a two-family dwelling in Brooklyn, located at 459 Washington Avenue, Brooklyn, NY, for summary judgment. The prior motion for similar relief was denied for being defective. Both sides now have different lawyers and still the papers appear to lack an understanding of the nature of this proceeding. The court notes that this action was commenced two months before the enactment of the Uniform Partition of Heirs' Property Act in NY, located at RPAPL §993 et seq., which provides an alternate scheme for partition actions and permits the property to be sold with a real estate broker instead of at an auction on the courthouse steps. Therefore, the new law is not applicable to this matter unless the parties stipulate to proceed under it.

In a partition action, a motion for summary judgment essentially means that the parties in the caption own the property and disagree about some aspect of the ownership or management of it, and so it should be sold so the parties can go on with their lives. The result of such a motion is an order appointing a referee to ascertain the parties' rights in the property, prior to an application for an interlocutory judgment to sell, which also requires a determination of whether there are any liens or judgments on the property or against the parties. After these issues are resolved, with an order confirming the Referee's report, an interlocutory judgment of sale is issued, then, after the sale, an accounting hearing is held, then a final judgment is issued and the sale proceeds distributed. By statute, plaintiffs' are entitled to costs and disbursements in the judgment, but are not entitled to attorneys' fees. The court has the discretion to award \$3,000 towards them. RPAPL §981. Here, plaintiffs' first attorney did not even file a Notice of Pendency when the action was started, indicating total ineptitude. Now, such a notice may not be filed without leave of court. Here, plaintiffs also ask the court to dismiss the counterclaim [sic] and the affirmative defenses asserted in the defendant's answer. Defendant's first counterclaim "As and First the Counterclaim" states that plaintiff Emerson Atkins (defendant's father) harassed her. The second counterclaim states that defendant offered to purchase the property, and Emerson Atkins responded by obtaining an order of protection against her in Family Court. The affirmative defenses are equally meritless. The first states that the complaint fails to state a cause of action, the second that plaintiff [sic] acted in bad faith and has unclean hands, and the third that plaintiff [sic] has failed to mitigate damages "by offering a reasonable settlement to defendant."

Upon the foregoing papers, and as the defendant has appeared and answered the complaint, and her only opposition is that “discovery” is not complete, and further, as the defendant is not an infant, absentee or unknown, and on motion of The Price Law Firm, LLC, attorneys for plaintiffs, which came on to be heard on July 7, 2022, and neither side requested virtual oral argument, it is **ORDERED** that:

1. Plaintiffs are granted summary judgment on their claim for partition. The defendant’s answer, including the counterclaims, is hereby stricken. There is no tort of harassment. It is a crime, and it is a family offense for purposes of an order of protection, but it is not a cause of action which can result in money damages (see *Gentile v Allstate Ins. Co.*, 288 AD2d 180 (2nd Dept 2001)). Nor is there a specific statute that creates a claim for harassment under the circumstances as set forth in the answer. Additionally, the affirmative defenses asserted have no merit.

2. Bruno Codispoti, Esq., with offices at 26 Court Street, Suite 1503, Brooklyn, NY 11242, (212) 962-6525, bruno@codispotilaw.com, is appointed referee in this action to ascertain and report the rights, shares and interests of the several parties to this action in the property described in the complaint and of which a partition is sought; to secure an abstract of the conveyances by which said property is held; to take proof of the parties’ title and interest in said property; to take an account of the rents received by defendant and to report on these matters; and to report whether the property or any part thereof is so circumstanced that a partition of the property cannot be made without great prejudice to the owners.

3. If the referee concludes that a sale of the property, or any part of the property,

is necessary, then the referee shall secure a lien search and ascertain whether there is any creditor, not a party to the action, who has a lien on the subject property or the undivided share or interest of any party in the property previously described.

4. The referee, in accordance with RPAPL §913, shall cause a notice to be published once a week for four successive weeks in The Brooklyn Daily Eagle, a newspaper published in Kings County, which is the county in which the place of trial is designated and also the county in which the property is situated, requiring each person not a party to the action, who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee at his law office or virtually, on or before a date at least 20 and no more than 60 days after the publication, to prove his/her/its lien and the amount due or to become due to him/her/it on the lien.

5. The referee shall report to the court as soon as possible the name of each creditor whose lien is satisfactorily proved before him (or her), the nature and extent of the lien, the date of the lien and the amount due or to become due on the lien.

6. The Referee shall make his/her report no later than 120 days from the date of this order and except for good cause shown, the Plaintiffs shall move to confirm the Referee's report and for an interlocutory judgment to sell no later than 90 days from the date of the Referee's report.

7. With the submission of the Referee's Report, the Referee shall include an affirmation of services rendered so the court may award the Referee compensation for his/her services, which sum may be recouped by plaintiff as a cost of litigation.

8. The Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall notify the Appointing Judge forthwith.

9. By accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36), including but not limited to, Section 36.2(e) ("Disqualifications from appointment"), and Section 36.2(d) ("Limitations on appointments based upon compensation").

This shall constitute the decision and order of the court.

Dated: July 21, 2022

ENTER :



Hon. Debra Silber, J.S.C.