

**Antioco v Antioco**

2022 NY Slip Op 34420(U)

December 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 511585/21

Judge: Ingrid Joseph

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At an IAS Part 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 360 Adams Street, Brooklyn, New York, on the 27th day of December, 2022.

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

-----X  
PETER ANTIOCO,

Plaintiff,

Index No.: 511585/21

-against-

PAUL ANTIOCO, WILLIAM ANTIOCO  
and PETER SEAN ANTIOCO,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) \_\_\_\_\_

7-11, 29-40

Opposing Affidavits (Affirmations) \_\_\_\_\_

30-40, 41

Reply Affidavits (Affirmations) \_\_\_\_\_

41, 42

Upon the foregoing papers, plaintiff, Peter Antioco (“plaintiff”), moves by Notice of Motion (Motion Seq. 1) for an order granting summary judgment pursuant to CPLR § 3212 on his cause of action for partition and sale of the parties’ single-family home located at 26 86<sup>th</sup> Street in Brooklyn, New York (Block 6040, Lot 31) (“Property”). Plaintiff further requests an accounting of the parties’ respective interest in such Property pursuant to RPAPL § 901.

Defendant Peter Sean Antioco (PSA) cross-moves (Motion Seq. 2) for an order (1) finding that the Property and two other properties, located at 7716 3rd Avenue, Brooklyn,

New York (Block 5959, Lot 46) ("7716 Property") and 7712 3rd Avenue, Brooklyn, New York (Block 5959, Lot 45) ("7712 Property"), are "heirs property," pursuant to RPAPL § 993 (3) (b); (2) the issuance of a notice to all parties, pursuant to RPAPL § 993 (7) (a), stating that plaintiff, as owner of an undivided one-half (50%) interest in the Property, has sought a partition by sale of the Property, and that PSA, as co-tenant, has the right to avert the partition by purchasing all interest held by plaintiff; and further stating that PSA, as owner of undivided 16.6% interest in both the 7716 Property and the 7712 Property (collectively, 7716 and 7712 Properties or the Properties), has sought partition by sale of those properties, and that Cross-Defendants 7716-3rd Ave, LLC (7716 LLC) and 7712-3rd Ave, LLC (7712 LLC), as co-tenants of the 7716 and 7712 Properties, respectively, have the right to avert the partition by purchasing all interest held by PSA; and (3) scheduling a settlement conference as mandated by RPAPL § 993 (5).

By deed dated August 16, 2006, Ellen Antioco (EA), plaintiff's wife and the mother of defendants Paul Antioco (PA), William Antioco (WA) and PSA (collectively, defendants), conveyed an undivided one-half (50%) interest in the Property to herself and plaintiff, as tenants by the entirety, and the other undivided one-half (50%) interest in the Property to defendants, their three sons, such that the defendants each own an undivided one sixth (16.6%) interest, as joint tenants. Upon EA's death in 2007, plaintiff solely became one-half (50%) owner of the Property, as EA's interest in the Property passed to him by operation of law. Thereupon, plaintiff owned the Property as a tenant in common with the joint tenancy of the defendants.

On May 17, 2021, plaintiff commenced this action by the filing of a summons and complaint.<sup>1</sup> In his complaint, plaintiff alleges that he and defendants own the Property as tenants in common; that PSA is the only party who continues to reside at the Property; that PSA “committed ouster” by changing the locks to the Property and preventing plaintiff from entering and retrieving his personal property; and that PSA has failed to pay real estate taxes and other Property expenses. As such, plaintiff seeks partition and sale of the Property and distribution of the proceeds to the parties according to their respective rights and interests, as he alleges that the Property is so situated that a partition thereof among the parties according to their respective rights and interests (partition in kind) cannot be had without great prejudice to the parties.

On September 21, 2021, PSA interposed a Verified Answer with affirmative defenses and a counterclaim, as well as a summons with cross claims against 7716 LLC and 7712 LLC. In his answer, PSA admits that he owns an undivided 16.6% interest in the Property; that he continues to reside at the Property; and that the Property is so situated that partition in kind cannot be had without great prejudice to the parties. However, PSA denies that he ousted plaintiff from the Property and that he failed to pay real estate taxes or other Property expenses. As a counterclaim, PSA admits that plaintiff and defendants own the Property as tenants in common but asserts that the Property is “heirs property,” pursuant to RPAPL § 993, and seeks partition under that statute.

In his cross claims, PSA seeks partitions and accountings of the 7716 Property, where WA resides, and the 7712 Property, where PA resides, pursuant to RPAPL § 993

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<sup>1</sup> Although entitled “Verified Complaint,” the complaint is unaccompanied by a verification.

on the basis that said properties are also “heirs property.” According to PSA, similar to the Property, EA also conveyed an undivided one-half (50%) interest in the 7716 and 7712 Properties, by separate deeds dated August 16, 2006, to herself and plaintiff, as tenants by the entirety, and the other undivided one-half (50%) interest to defendants, as joint tenants. Thereafter, title was transferred as follows:

By deed dated December 10, 2012, plaintiff conveyed his interest in the 7716 Property to WA. Thereafter, PA conveyed his interest in the 7716 Property to WA by deed dated July 16, 2018. WA then conveyed his 83.4% interest in the 7716 Property to 7716 LLC, of which WA is the sole member, by deed dated August 31, 2020. However, PSA retained his 16.6% interest and, thus, currently owns the 7716 Property with 7716 LLC, as tenants in common.

Similarly, plaintiff conveyed his interest in the 7712 Property to PA by deed dated December 10, 2012. Thereafter, WA conveyed his interest in the 7712 Property to PA by deed dated July 16, 2020. PA then conveyed his 83.4% interest in the 7712 Property to 7712 LLC, of which PA is the sole member, by deed dated August 31, 2020. However, PSA retained his 16.6% interest and, thus, currently owns the 7712 Property with 7712 LLC as tenants in common.

Neither WA, PA, 7716 LLC nor 7712 LLC have filed an answer or otherwise appeared in this action.<sup>2</sup>

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<sup>2</sup> Plaintiff only filed proof of service of the complaint upon PSA (NYSCEF Doc No 5). No proof of service of the complaint upon WA and PA was filed. Additionally, although proof of service of the instant motion upon WA and PA was filed, no proof of service of the motion upon 7716 LLC or 7712 LLC was submitted. However, plaintiff’s failure to file such proofs of service is not relevant at this time in light of this court’s decision.

On October 27, 2021, plaintiff filed the instant motion for summary judgment for partition by sale of the Property and an accounting, pursuant to RPAPL § 901. In support of his motion plaintiff submitted his attorney affirmation, the pleadings and the Property deed. Plaintiff argues that he is entitled to a judgment as a matter of right that grants a partition by sale pursuant to RPAPL § 901, since it is undisputed that he and defendants own the Property as tenants in common and that the Property is so situated that partition in kind cannot be had without great prejudice to them. Plaintiff further argues that, as he and PSA do not own any other properties in common, the 7716 and 7712 Properties are improperly included in this action and, thus, have no bearing on his motion.

PSA opposes the motion and cross-moves for an order finding that the Property and the 7716 and 7712 Properties are “heirs property,” pursuant to RPAPL § 993 (3) (b); issuing a notice to all parties, pursuant to RPAPL § 993 (7) (a); and scheduling a settlement conference, pursuant to RPAPL § 993 (5). In opposing plaintiff’s motion, PSA argues that the complaint is not properly verified by a person with personal knowledge or by an attorney based upon CPLR § 3020 (d), as required by RPAPL § 1605. Thus, the complaint should be dismissed. Alternatively, PSA argues that the Uniform Partition of Heirs Property Act (RPAPL § 993 or the Act), not RPAPL § 901, is controlling herein, since the Property is “heirs property,” as defined by RPAPL § 993 (2) (e). PSA contends that plaintiff’s motion is premature pursuant to RPAPL § 993 (5) (g), based upon his contention that the 7716 and 7712 Properties are “heirs property.”<sup>3</sup> PSA also makes the

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<sup>3</sup> Notably, PSA did not file an affidavit of service of his cross motion upon PA, WA, 7716 LLC and 7712 LLC. The filing of the cross motion via NYSCEF only constitutes service of same upon plaintiff, since plaintiff, by his attorney, consented to e-filing pursuant to Uniform Rules for Trial Cts [22 NYCRR] §§ 202.5-b (a) (1), (b) (2) (i) and (f) (2) (ii). However, neither PA,

point that the settlement conference process set forth in RPAPL § 993 (5) must be concluded before summary judgment can be granted. PSA requests that the court determine that the Property and the 7716 and 7712 Properties are “heirs property” under RPAPL § 993, send a notice to all parties that specifies their respective ownership interests, advise the parties of their respective right to avert partition by purchasing the interests of the parties seeking partition, and schedule a settlement conference as mandated by RPAPL § 993 (5).

In opposition, plaintiff argues that PSA’s cross motion should be denied based upon his contention that the 7716 and 7712 Properties are not within the ambit of RPAPL § 993. Plaintiff claims that the Properties are currently owned by business entities and PSA has not submitted proof of any fraud with regard to WA or PA’s transfer of their respective interests in the Properties. Plaintiff also contends that no proof was submitted to substantiate piercing the veils of 7716 LLC or 7712 LLC to impute liability on WA or PA. Therefore, plaintiff argues that the branch of PSA’s cross motion seeking relief as to 7716 LLC and 7712 LLC should be denied.

PSA argues that plaintiff’s motion should be denied and the complaint dismissed because it was not properly verified. However, plaintiff contends that s argument is unavailing since verification of a complaint is optional under CPLR § 3020. Plaintiff also maintains that he is entitled to summary judgment since PSA failed to raise a triable issue

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WA, 7716 LLC nor 7712 LLC consented to e-filing. Therefore, said defendants must be served with hard copies of all documents in accordance with the CPLR and proof of service of same must be e-filed, pursuant to 22 NYCRR 202.5-b (b) (2) (i).

of fact. The court notes that plaintiff did not address PSA's argument that the Property qualifies as "heirs property" under RPAPL § 993.

In reply, PSA contends that plaintiff has conceded that the Property is "heirs property" under RPAPL § 993 by not disputing same in his opposition papers. PSA maintains that the court must apply RPAPL § 993, which governs "heirs property," and deny plaintiff's summary judgment motion, since RPAPL § 993 (5) mandates that a settlement conference be held, prior to summary judgment determination, upon a finding that property, subject to partition, is "heirs property."

Additionally, PSA avers that plaintiff's arguments regarding the relief sought against 7716 LLC and 7712 LLC should be disregarded, since a party opposing a motion may only oppose the relief sought against it. Alternatively, PSA argues that, although 7716 LLC and 7712 LLC are the "record owners" of the 7716 and 7712 Properties, respectively, triable issues of fact remain as to whether beneficial ownership can be imputed to WA and/or PA for the purposes of determining whether those Properties are "heirs property," which must be determined when, or if, 7716 LLC and/or 7712 LLC appear and raise a defense as to the inapplicability of RPAPL § 993. In addition, PSA asserts that the analysis regarding piercing the corporate veil is inapplicable herein, since ownership of the Properties is at issue, not the imposition of liability upon WA and PA.

The court will first address plaintiff's motion for summary judgment. It is well settled that summary judgment may only be granted when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hospital*, 68 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557

[1980]). The movant has the burden to make a prima facie showing of entitlement to summary judgment as a matter of law, by submitting admissible evidence demonstrating that there are no material facts that require a trial (*see Giuffrida v Citibank*, 100 NY2d 72 [2003]). Failure to make this showing requires denial of the motion, regardless of the opposing papers' adequacy (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). If a prima facie showing is made, the burden shifts to the opposing party to produce admissible evidence demonstrating the existence of a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 557 [1980]).

Contrary to PSA's contentions, plaintiff's unverified complaint neither warrants dismissal of the complaint nor denial of plaintiff's motion. PSA's reliance on RPAPL § 1605, which requires verification of petitions brought under RPAPL §§ 1601 and 1602, is misplaced, since this action was commenced pursuant to RPAPL § 901, not RPAPL § 1601 or § 1602. An action brought pursuant to RPAPL § 901, by which joint tenants or tenants in common may seek a partition and sale of their real property, differs from an action brought under RPAPL § 1601, by which a trustee may seek court authorization to mortgage, lease, sell, acquire or exchange real property, or RPAPL § 1602, by which any owner of a present or future interest in real property may seek court authorization to mortgage, lease or sell the property (*see RPAPL §§ 1601, 1602 and 901*). Furthermore, unlike RPAPL § 1605, RPAPL § 905, which governs pleadings in actions brought under RPAPL § 901, does not require such complaints to be verified (*see RPAPL § 905*).

Notably, CPLR § 3020 also does not mandate verification of a complaint (see CPLR § 3020 [a]).

Under RPAPL § 901, where there is no agreement preventing partition and a court has not made a determination as to use or possession of real property, “[a] person holding and in possession of real property as [a] joint tenant or tenant in common... 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” (see RPAPL § 901 [1]; *Ehrgott v Buzerak*, 49 AD3d 681 [2d Dept 2008]; *McNally v McNally*, 129 AD2d 686 [2d Dept 1987]). However, the right to partition is not absolute, the court must weigh the equities between the parties before determining whether partition is appropriate (see *Graffeo v Paciello*, 46 AD3d 613 [2d Dept 2007]; *Bufogle v Greek*, 152 AD2d 527 [2d Dept 1989]). Furthermore, actual possession is not a prerequisite to a partition action, constructive possession, which follows title, is sufficient (see *Garland v Raunheim*, 29 AD2d 383 [1st Dept 1968]; *Deegan v Deegan*, 247 AD 340 [2d Dept 1936]; *Bender v Terwilliger*, 48 AD 371 [3d Dept 1900], *affd* 166 NY 590 [1901]; *Diamond v Schwartz*, 26 Misc 3d 1202(A) Sup Ct, NY County 2009, Tolub, J.).

Here, the court finds that plaintiff has sufficiently demonstrated the absence of any triable issues of fact regarding his ownership and right to possession of the Property, which is the prima facie showing needed to demonstrate a viable partition action under RPAPL § 901 (see RPAPL § 901[1]; *Dalmacy v Joseph*, 297 AD2d 329 [2d Dept 2002]). PSA has also established that the Property is “heirs property” under RPAPL § 993 (2) (e), in that it meets all the requirements for “heirs property” as set forth in that provision,

which plaintiff does not refute. The Act, which became effective on December 6, 2019, defines “heirs property” as

“real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action: (i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property; (ii) any of the co-tenants acquired title from a relative, whether living or deceased; and (iii) any of the following applies: (A) twenty percent or more of the interests are held by co-tenants who are relatives; (B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; (C) twenty percent or more of the co-tenants are relatives of each other; or (D) any co-tenant who acquired title from a relative resides in the property” (RPAPL § 993 [2] [e]).

Here, as PSA argues, the Property meets the definition of “heirs property” under RPAPL § 993 (2) (e), in that there is no agreement between the co-tenants regarding partition of the Property; at least one of the co-tenants obtained their respective interests in the Property from a relative (EA); more than 20% of the interest in the Property is held by co-tenants who are relatives; and PSA, who acquired title from EA, resides in the Property (*see* RPAPL § 993 [2] [e]).

As the court has determined that the Property is “heirs property,” in accordance with RPAPL § 993 (3) (b) and (c),

(b) . . . the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record, otherwise, it is understood

(c) . . . that Section 993 supplements the general partition statute (RPAPL § 901) but replaces the provisions of RPAPL 901 that are inconsistent with this section.”

Accordingly, RPAPL § 993 is controlling herein. Therefore, plaintiff’s request for summary judgment is premature pursuant to RPAPL § 993 (5), which mandates that a

settlement conference be held prior to determination of a summary judgment motion (*see* RPAPL §§ 993 (5) (a), (b) and (g)). Further, all parties must be provided with notice, pursuant to RPAPL § 993 (7) (a), stating that plaintiff, as owner of an undivided one-half (50%) interest in the Property, has sought a partition by sale of the Property, and that PSA, PA and WA, as co-tenants, have the right to avert the partition by purchasing all interest held by plaintiff; and a settlement conference must be held relative to the interests, rights and obligations of the parties regarding the Property, pursuant to RPAPL § 993 (5). Thus, the court finds that plaintiff's motion is subject to denial with leave to renew in the event this action is not finally resolved during the settlement conference process (*see* RPAPL § 993 [8]).

The CPLR explicitly allows cross claims to be brought against non-parties (*see* CPLR § 3019 [b], [d]). In this regard, CPLR § 3019 [d] treats a claim asserted by a defendant by cross claim or counterclaim as a complaint and the person or entity against whom the claim is asserted as a new party, if the person or entity is served with such a claim together with a summons (*see* CPLR § 3019 [d]; Siegel, NY Prac 227 at 389 [5 ed 2011][a cross-claim is interposable against a nonparty where "[t]he non-party is joined by filing a copy of the answer containing the cross-claim along with a summons, paying a filing fee, and then serving the answer and summons on the nonparty being joined"]). Furthermore, CPLR § 3019 [b] permits a cross claim to be asserted for any cause of action without requiring the cause of action to be dependent on the plaintiff's claim (*see* CPLR § 3019 [b]; *see also La France Carpets, Inc. v United States Rubber Co.*, 19 AD2d 812 [1st Dept. 1963]; *Bacon v Arden*, 244 AD2d 940 (4th Dept. 1997)).

Here, a review of the record reveals that 7712 LLC and 7716 LLC were both served with copies of the summons and PSA's verified answer with cross claims with notice of electronic filing on October 5, 2021. Thus, contrary to plaintiff's contentions, the cross claims asserted by PSA against 7716 LLC and 7712 LLC are properly asserted in this action (*see* CPLR § 3019 [d]; 10 Warren's Weed New York Real Property § 103.92 [stating that a partition action involving several parcels of land, in which only some of the plaintiffs and defendants had an ownership interest, can be maintained]). However, since neither PA, WA, 7716 LLC nor 7712 LLC have answered or otherwise appeared in this action, and PSA has failed to file proof of service of his cross motion upon said parties, that branch of his cross motion seeking relief as against said parties must be denied.

Accordingly, it is

ORDERED that plaintiff's motion (Motion Seq. 1) for summary judgment is denied with leave to renew in accordance with RPAPL § 993 (8), in the event this action is not finally resolved during the settlement conference process to be conducted herein pursuant to RPAPL § 993 (5); and it is further

ORDERED, ADJUDGED and DECLARED that PSA's cross motion (Motion Seq. 2) is granted solely to the extent that the Property (26 86th Street, Brooklyn, New York) is deemed "heirs property" in accordance with RPAPL §§ 993 (2) (e) and (3) (b); that all parties are hereby put on notice, pursuant to RPAPL § 993 (7) (a), that plaintiff, as owner of an undivided one-half (50%) interest in the Property, has sought a partition by sale of the Property, and that PSA, PA and WA, as co-tenants, have the right to avert the

partition by purchasing all interest held by plaintiff; and that all parties are directed to appear in the Partitions Settlement Part, Kings County in accordance with the provisions outlined under RPAPL § 993; and it is further

ORDERED that the Clerk assigned to the Partitions Settlement Part shall upload a Settlement Conference Notice in NYSCEF, and it is further

ORDERED that plaintiff is directed to post a copy of the Settlement Conference Notice in a conspicuous place on the Property within twenty (20) days of the Clerk's filing of such and file affidavits of service of same with the court within ten (10) days of said service; and it is further

ORDERED that such service shall constitute good service of the pleadings in this partition action in accordance with RPAPL § 993 (4) (b); and PA, WA, 7716 LLC and 7712 LLC shall be subsequently given time to file their respective answers as provided in RPAPL § 993 (5) (d), if they appear at the first settlement conference.

This constitutes the decision and order of the court.

E N T E R,



HON. INGRID JOSEPH, J.S.C

**Hon. Ingrid Joseph**  
**Supreme Court Justice**