

Smith v Smith

2022 NY Slip Op 34512(U)

June 10, 2022

Supreme Court, Herkimer County

Docket Number: Index No. EF2021-108166

Judge: John H. Crandall

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At a term of Supreme Court held for the County
Of Herkimer in the County of Herkimer, in the
Village of Herkimer, New York on the 29th day of
March 2022.

STATE OF NEW YORK
SUPREME COURT HERKIMER COUNTY
PRESENT: HON. JOHN H. CRANDALL, AJSC

**Christopher Smith and Michael Smith as
Trustees of the Jay and Patricia Smith
Irrevocable Trust
Plaintiffs,**

DECISION AND ORDER
Index No. EF2021-108166
RJI No. 21-21-147

vs.

**Anna J. Smith, as Trustee of the Theodore P. Smith
Income only Irrevocable Trust, and Theodore P. Smith
Defendants.**

Factual Background

Plaintiffs Christopher Smith and Michael Smith are the Trustees of the Jay and Patricia Smith Irrevocable Trust (hereinafter Trust or Plaintiff).

The Defendants are Anna J. Smith, as Trustee of the Theodore P. Smith Income Only Irrevocable Trust and Theodore P. Smith, (hereinafter Defendants). Together the parties own and possess real property in Herkimer County, New York as tenants in common¹. The Plaintiffs hold

¹The property is situated I the Town of Middleville and Newport and described as 84 Herkimer Street Middleville, New York and recorded in the Herkimer County Clerk's Office on January 18, 2002, in Book 903 of Deeds at pages 72, 75, 78, and 84. The portions of the property in the Town of Middleville are known as Tax identification numbers 100.58-1-33, 100.58-1-32, 100.58-1-26, 100.58-1-24, 100.58-1-17. The portion of the property situate in the Town of Newport is known as tax identification number 100.4-2-3.

an undivided two-thirds ownership interest in the property and Defendants hold an undivided one-third ownership interest. Defendants operate a business known as Ace of Diamonds Mine & Campground, LLC on the property. Ace of Diamonds is an LLC operated by Anna J. Smith as Trustee of the Theodore P. Smith, Income Only Irrevocable Trust. Ace of Diamonds operates commercial and tourist mining enterprises as well as a campground on the property. The entirety of the property was conveyed to the parties as tenants in common. Donald Smith, father of Jay Smith and Theodore P. Smith, had operated a business on the property under the same name. The Ace of Diamonds LLC. business footprint is expansive and extends beyond one-third of the premises.

The mining involves the extraction of “Herkimer Diamonds” which are a unique quartz crystal, composed of silicon dioxide. Because of their unique characteristics, “Herkimer Diamonds” are valuable. The crystals are found throughout the property. The most valuable crystals are believed to be found in a “pocket layer, “ which runs in a roughly north-south line. Much of the “pocket layer” remains unexposed as it lies underneath overburden which consists of bedrock, dolostone and/or glacial till at varying depths. The ability to access the “pocket layer” depends upon the thickness, nature and density of the overburden covering it. In some areas the pockets are accessible through removal of rock, exposing the pockets from the side. The southernmost point (where the tourist mining occurs) is largely unexposed as it sits under approximately twenty feet of bedrock. Substantial mechanized mining has occurred in sections of the mine where the overburden covering the pocket layer is thinner at approximately nine feet, making the crystals easier to mine. However, over much of the “pocket layer, “ the thickness of the overburden cannot be determined without coring. (Paragraph 14 from report of Adam Schoonmaker, Ph.D). Thus, not all areas of the “pocket layer” are equally accessible. Thick overburden can be very costly to remove. (Paragraph 20 from report of Adam Schoonmaker Ph.D). Further, the quantity and quality of quartz crystals remaining in the unexposed “pocket layer” cannot be accurately determined. In short, not all sections of the “pocket layer” are equally accessible from a mining perspective. (Paragraph 19 from report of Adam Schoonmaker, Ph.D)

Plaintiffs contend they have substantially contributed to the Ace of Diamonds business in the form of services and materials, with the understanding it was the family business.

In 2013 the parties commenced a verbal lease agreement whereby the Defendants would make annual lease payments to the Plaintiff Trust of \$21, 000.00.

Plaintiffs allege that since that time the volume of the mining activity on the premises has substantially increased. As such, the Plaintiffs attempted to re-negotiate the terms of the lease, such that the lease payments would be commensurate with their two-thirds ownership interest. The parties failed to reach an agreement. Defendants continued to mine the property without compensating the Plaintiffs, which they allege has been a windfall to the Defendants, to the detriment of Plaintiff.

Procedural History

On April 27, 2021, the Plaintiffs filed a verified complaint seeking, inter alia, an Order directing partition and sale of the property, alleging that an Order of partition alone, would be impossible and impractical as the accessibility, location, quality, and quantity of the crystals is not certain.

On May 6, 2021, this Court issued an Order to Show Cause with a temporary restraining order whereby Plaintiffs sought a preliminary injunction. Defendants cross-moved to vacate or modify the temporary restraining order pending the Court's determination on the Plaintiffs' motion for a preliminary injunction as per the procedures set forth in New York Real Property Actions and Procedure Law Section 993. (The Heirs Act).

On June 17, the Court, after hearing arguments on June 10, 2021, modified the temporary restraining order of May 6, 2021, such that:

1. The Defendants were prohibited from conducting or permitting any form of “commercial mining” during the pendency of the action;
2. “Tourist mining” shall be permitted during the pendency of this action on the southern portion of the property where tourist mining had been permitted in the past;
3. Defendants were permitted to sell minerals mined prior to the temporary restraining order in the gift shop on the property and
4. Defendants were permitted to operate the camping business on the property during the pendency of the action.

Conclusions of Law

New York State Real Property Actions and Proceedings Law Section 901(1) states:

“A person holding and in possession of real property as joint tenant or tenant in common, in which he 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.”

There is no dispute that the Plaintiffs own an undivided two-thirds interest in the property as tenants in common with Defendants holding title to the remainder. Plaintiffs have established prima facie standing to seek partition and are authorized to dispose of the property.

Partition and sale among joint tenants or tenants in common as a matter of right absent a showing that prejudice would result from partition. RPAPL 901 The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, , the remedy is always subject to the equities between the parties. (See Graffeo v. Paciello, 46 A.D. 3d 613, 614, (2nd Dept. 2007).

Partition and sale are required upon proof “that the property is so circumstanced that a partition thereof cannot be made without great prejudice to the owners.” RPAPL Section 901; Graffeo v. Paciello, 46 A.D. 3d 613, 614, (2nd Dept. 2007).

Viable claims for partition and sale must rest upon allegations of a joint common ownership in real property with attendant rights to possession and that the equities favor the claimant and, where a sale rather than an actual partition is demanded, proof that a physical partition of the premises cannot be made without great prejudice to the parties is also required. Galitskaya v. Presman, 92 AD 3d 637, 2nd Dept. 2012); James v. James, 52 AD 3d 474, (2nd Dept. 2008).

In Snyder Fulton St., LLC v. Fulton Interest, LLC, 57 AD 3d 511 (2nd Dept. 2008), the Second Department reversed an Order of partition of real property where the partition would have been “prohibitively expensive and dangerous” and result in a significantly reduced value of the property. The Court held that physical partition is authorized unless such physical partition would cause great prejudice to the owners, which then requires sale at public auction. Id at 514.

Likewise, here, the quartz crystals are likely to be in the “pocket layer, “ which exists under different styles of overburden. Not only would partition likely create unequal division of the “pocket layer, “ of which there may be differing quantity and quality of crystals, but the extent and expense of access to the “pocket layer” is largely unknown and thus, cannot be equitably accounted for by the Court.

Further, the Ace of Diamonds, LLC., physical plant, extends beyond one-third of the

premises, making partition further complex as physical structures may then necessarily need be considered.

Thus, partition would greatly prejudice the parties. The property as divided will likely have significantly less value. It is not possible or practical for this Court to partition the property.

WHEREFORE, it is hereby

Ordered, that the said premises be sold at public auction, under the supervision of a Court appointed Referee, with conveyance given to the purchaser; that from sale proceeds the Referee, Broker and fees associated with the sale and/or maintenance of the property shall be satisfied; and it is further

Ordered, that the parties account for their respective expenditures and receipts relative to the property and upon the completion thereof, there shall be paid out of the proceeds of the sale such sums as shall be ascertained to be due and owing; and it is further

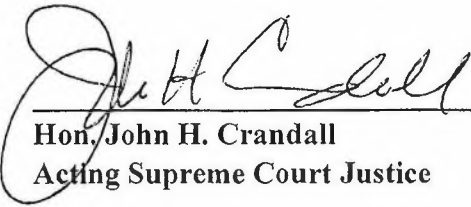
Ordered, that the residue of all sums ascertained through the sale of the property and ascertained by the accounting and/or from the receivership, shall divide as per the parties' respective ownership interests, two-thirds to Plaintiffs and one-third to Defendants; and it is further

Ordered, that the attorney for the Plaintiffs shall submit, on notice to the Defendants, a proposed Order of Partition and Sale, consistent with this Decision and Order and providing, in blank for the appointment of a referee of sale in accordance with RPAPL Section 915, and such other necessary matters, including those required by 22 NYCRR Part 36.

The foregoing constitutes the opinion, Decision and Order of the Court.

Dated: June 10, 2022
Herkimer, New York

ENTER,



Hon. John H. Crandall
Acting Supreme Court Justice