

Gelinas LLC. v Hayes

2022 NY Slip Op 34843(U)

April 4, 2022

Supreme Court, Bronx County

Docket Number: Index No. 800450/2021E

Judge: Kenneth L. Thompson, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

GELINAS LLC.,

Index No: **800450/2021E**

Plaintiff,

-against-

DECISION AND ORDER

JACQUELINE HAYES and VALERIE GALLOWAY,

Present:

HON. KENNETH L. THOMPSON, JR.

Defendants

_____ X

The following papers numbered 1 to read on this **motion to renew and reargue**

No On Calendar of **November 10, 2021** PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----**motion sequence #2 NYSCEF**
Answering Affidavit and Exhibits-----

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 2221 to reargue and renew the decision and order of this Court dated September 16, 2021, which denied plaintiff’s motion for summary judgment. Plaintiff also moves to discontinue action against defendant Valerie Galloway. Plaintiff further moves pursuant to RPAPL 911 for the appointment of a referee in this partition action.

Pursuant to CPLR 2221 (e) “a motion for leave to renew:… (2) shall be based upon new facts not offered on the prior motion that would change the prior determination.”

Defendant, Jacqueline Hayes, (Hayes), is the only answering defendant, though she has defaulted on this motion and the underlying motion. It is undisputed that Hayes and decedent Charlesanna Adams, (Adams), held the subject real property¹ as tenants in common when Adams died in 2005. Plaintiff has submitted two affidavits on the branch of this motion to renew, that conclusively establish that Hayes is not a distributee of Adams. Hayes’ avers in an

¹ 1437 Teller Avenue, Bronx, New York.

affidavit dated September 10, 2021, submitted in another action concerning disputed real property, that she never maintained that she was Adams' sister, and when she learned that the filed Surrogate court papers represented that she was Adams' sister, she instructed her attorney to withdraw the petition.² Hayes averred that she met Adams "at work, developed friendship that later developed into a romantic relationship."³

Plaintiff also submitted the affidavit of Stephen M Schwartz, (Schwartz), who avers he has been qualified as an expert witness in the field of genealogy in Bronx Surrogate court as well as other courts in New York. Schwartz avers that "[a]fter exhaustive research, I conclude that the Decedent was survived by only two issue of her parents, John Virgil Galloway Jr. and Valerie L. Galloway." Therefore, John and Valerie Galloway each have a 50% interest in the Adams' estate and each have a 25% interest in the subject real property. By deed dated May 15, 2020, John Galloway Jr. transferred his 25% interest in the subject real property to plaintiff. Plaintiff's attorney avers that the non-answering defendant, Valerie Galloway, "has now sold her 25% interest in the Property to Plaintiff, rendering plaintiff and Hayes tenants in common and necessitating that this action for partition be discontinued as to her [Valerie Galloway]."⁴

With respect to that branch of plaintiff's motion that seeks to reargue the underlying motion for summary judgment pursuant to CPLR 2221 (d) a "motion to reargue:... (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." As a result of reconsideration it is held that the service of the underlying motion for summary

² Affidavit dated September 10, 2021, Jacqueline Hayes, paragraphs 12 and 13.

³ Affidavit dated September 10, 2021, Jacqueline Hayes, paragraph 4.

⁴ Affirmation in support of Nancy L Kourland, Esq., dated October 7, 2021, paragraph 49.

judgment upon Adams was accomplished pursuant to 22 NYCRR 202.5-b with the filing of the motion on NYSCEF. The directed referral to Surrogate Court is now moot.

With respect to a partition, “before a partition may be directed, a determination must be made as to the “rights, shares, or interests of the parties, and whether partition may be had without great prejudice” (*Lauriello v Gallotta*, 70 AD3d 1009, 1010 [2010]; *see* RPAPL 911, 915; *Wolfe v Wolfe*, 187 AD2d 628, 629 [1992]; *Grossman v Baker*, 182 AD2d 1119 [1992]; *George v Bridbord*, 113 AD2d 869, 871 [1985]). Further, it must be determined whether there are any creditors with liens on the subject property (*see* RPAPL 913).” *Wardally v. Wardally*, 186 A.D.3d 531, 532 [2nd Dept 2020]). With respect to that branch of plaintiff’s motion that seeks the dismissal of Hayes’ counterclaims, plaintiff has not established, *prima facie*, entitlement to dismissal of the counterclaims prior to an accounting of the profits and/or losses on the property, nor established, *prima facie*, that it was ousted from the property. “To obtain summary judgment it is necessary that the movant establish [a] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [movant’s] favor [CPLR 3212, subd. (B)], and [movant] must do so by tender of proof in admissible form” (*Friends of Animals v. Asso. Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]).

Accordingly, the motion to renew and reargue is granted and the decision and order of this Court dated September 16, 2021, is hereby vacated and upon renewal and reargument, the underlying motion for summary judgment is granted to the extent that it is:

ORDERED, that Jacqueline Hayes produce an accounting of income and expenses with respect to her management of 1437 Teller Avenue, Bronx, New

York, since the date of the transfer of the subject real property to plaintiff, May 15, 2020, to the present date; and it is further

ORDERED, that Joyce Braun, an attorney and counselor this Court, with an office at 40 Rockridge Rd Mont Vernon, Nj 10552, and telephone number, 914-668-8984, and email address

JoyceBraun@qyaho.com is appointed Referee in this partition action to: (1) ascertain and report the rights, shares, and interests of the parties, (2) ascertain and report whether the property can be partitioned without great prejudice to the owners or whether a sale of the property is necessary, and (3) ascertain and report, if the referee arrives at the conclusion that the sale of the property is necessary, whether there is any creditor not a party who has a lien upon the undivided share or interest of any party, and it is further

ORDERED, that this action is discontinued as against defendant Valerie Galloway and her name stricken from the caption; and that is further

ORDERED, that the mandatory settlement conference scheduled for May 2, 2022 is vacated, as no heir to decedent currently has an ownership interest in the subject property; and it is further

ORDERED, that the caption of this action is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20_____X

GELINAS LLC.,

Index No: 800450/2021E

Plaintiff,

-against-

JACQUELINE HAYES,

Defendants.

_____X

The foregoing constitutes the decision and order of the Court.

Dated: 4/4/2022

Kenneth L. Thompson Jr.
KENNETH L. THOMPSON JR. J.S.C.