

Townes v Townes

2023 NY Slip Op 30792(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 160069/2020

Judge: Mary V. Rosado

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
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

MARTIN TOWNES	INDEX NO. <u>160069/2020</u>
Plaintiff,	MOTION DATE <u>10/04/2021</u>
- v -	MOTION SEQ. NO. <u>001</u>

MELODY TOWNES,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, Plaintiff Martin Townes' ("Plaintiff") motion for partial summary judgment is denied without prejudice.

This is an action between Plaintiff and his sister, the Defendant Melody Townes ("Defendant"). The dispute involves a condominium unit located at 66-72 St. Nicholas Avenue, Unit 5B, New York, New York (the "Premises") (NYSCEF Doc. 1). Plaintiff alleges that the Premises was previously owned by his mother, Marion Townes ("Marion") (*id.* at ¶ 5). Plaintiff further alleges that Marion's last will and testament bequeathed all of her right, title, and interest in the Premises to Plaintiff and Defendant in equal shares, as tenants in common (*id.* at ¶ 6). Marion passed away on January 24, 2018 (*id.* at ¶ 8). At the time of Marion's death, Defendant was allegedly living in the premises (*id.* at ¶ 10). Defendant allegedly has continued residing in the premises to the present (*id.*).

Plaintiff alleges that by operation of law, the property passed to Plaintiff and Defendant as tenants in common (*id.* at ¶ 9). Plaintiff claims that he was excluded from the Premises as of January 24, 2018 (*id.* at ¶ 12). Plaintiff alleges that Defendant has failed to pay any rent to Plaintiff

despite excluding him from the premises and has failed to make any payments toward the taxes and maintenance fees (*id.* at ¶ 14). Plaintiff alleges a lien has now been placed by the Board of Managers of the St. Nicholas Court Condominium and a foreclosure action was commenced (*id.* at ¶ 15). Plaintiff seeks in this action partition pursuant to RPAPL § 901, rent and/or use and occupancy arrears from January 24, 2018 to the present, and asserts as a cause of action waste (*id.*).

Defendant has appeared *pro se*. She filed an affidavit on January 25, 2021, denying that Plaintiff is denied access (NYSCEF Doc. 4). Defendant also claims that she has been paying fees and rents, and that neither Plaintiff nor Defendant have any legal documents as proof of ownership to the Premises (*id.*).

On September 13, 2021, Plaintiff filed the instant motion for partial summary judgment (NYSCEF Doc. 5). Plaintiff argues that by reason of being an heir of Marion, who died holding possession of the Premises, he has an interest in the Premises due to the intestacy laws (NYSCEF Doc. 6). However, Plaintiff then submits an affidavit arguing that he has a right to the premises due to Marion's will, which he annexes as an exhibit in support of his motion (NYSCEF Doc. 7 at ¶ 4 and NYSCEF Doc. 8). Plaintiff relies on RPAPL § 901 in support of his argument.

Plaintiff's sister, the *pro se* Defendant submitted an affidavit in opposition (NYSCEF Doc. 17). Defendant's opposition again asserts that the Plaintiff had never been ousted, as he has always been offered keys and entry to the Premises. Further, Defendant asserts that a verbal agreement existed between the two siblings that they would sell the property eventually, but Defendant needed time to find a new place. Allegedly, Plaintiff told Defendant she could have all the time she needs and that he would never "put her out."

Plaintiff submits a very brief reply arguing solely that there are no triable issues of fact. However, this Court disagrees. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

Plaintiff has not shown he is entitled to judgment as a matter of law (*Arlo 67, LLC v Doyle*, 201 AD3d 689 [2d Dept 2022]). First, Plaintiff argues that he has an interest in the property through intestacy. Yet, at the same time, Plaintiff argues he has an interest in the property through his mother’s will. However, it appears the will was never probated. While the unprobated will designates Plaintiff and Defendant as devisees of the Premises, a will that was never probated has absolutely no legal effect, nor does this Court have the jurisdiction to give that will any legal effect. (*In re Wachman’s Estate*, 38 Misc.2d 213 [Sur. Ct. Nassau Co. 1963]). Indeed, the probate or proof of wills is peculiarly within the province of the New York Surrogate’s Court.

Further, Plaintiff’s attorney’s assertion that he was devised the property through intestacy is blatantly contradicted by both Plaintiff and Defendant’s assertion that a will exists. If Marion died intestate, Plaintiff has failed to submit compliance with Surrogates Court Procedure Act § 1001, which requires letters of administration be obtained by persons who are distributees of an individual who died intestate. Indeed, a grant of letters of administration entails an underlying determination that the decedent died intestate (*Estate of Von Ripper*, 95 Misc.2d 952 [Sur. Ct. New York Co. 1978]). Absent letters of administration regarding the intestate succession to Marion’s estate, or a probated will, Plaintiff has failed to establish as a matter of law his interest in the

property. Therefore, this Court is unable to grant partial summary judgment at this time. Letters of administration regarding intestate succession must be obtained or the will must be probated prior to the Court entertaining the possibility of granting Plaintiff the relief he seeks.

Accordingly, it is hereby,

ORDERED that Plaintiff Martin Townes' motion for partial summary judgment is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Martin Townes shall serve a copy of this Decision and Order on Defendant at her last known address via first-class mail; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

3/17/2023
DATE

Mary V Rosado J.S.C.
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE