

BFF Queens Corp. v Swepson

2023 NY Slip Op 33833(U)

October 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 524600/21

Judge: Robin S. Garson

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This opinion is uncorrected and not selected for official publication.

At IAS Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Supreme Court, at the Courthouse located at 360 Adams Street Brooklyn, New York, on the 27th day of October, 2023.

PRESENT:

Hon. ROBIN S. GARSON, Justice

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BFF QUEENS CORP.,

Plaintiff,

Index No.: 524600/21

Mot. Seq. 1 – Modified
Mot. Seq. 2

-against-

WILLIAM SWEPSON and
THOMAS SWEPSON, JR.,

**DECISION/ORDER OF
REFERENCE**

Defendants.
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For the reasons set forth below, the Court *sua sponte* recalls and modifies its prior Order dated November 10, 2022 (Mot. Seq. 1). Plaintiff BFF Queens Corp. moved for an order declaring, *inter alia*, that each of the parties to this action for partition is possessed of a one-third (1/3) undivided interest in the real property located at 704 Midwood Street, Brooklyn, New York. The Court erred in granting Plaintiff's motion on default. Accordingly, the Court recalls and vacates its contemporaneous referral to the administrative judge for the appointment of a Special Referee (NYSCEF Doc. 39). The Court's decision on Mot. Seq. 1 is hereby modified as follows:

By Order dated November 10, 2022, this Court issued an Order providing that "Plaintiff's motion is granted *on default* (emphasis added). [Plaintiff] shows prima facie that the subject property cannot be partitioned without great prejudice to the parties. This matter is referred to a special Referee to determine the interests of the parties." The matter was administratively

assigned to Special Referee Allman to “hear and determine” the “proportionate interest of the demised property.” Special Referee Allman issued his report making certain findings and determinations dated June 8, 2023.¹

A review of the NYSCEF filings herein shows that self-represented Defendant William Swepson did, in fact, interpose opposition to Plaintiff's motion (NYSCEF Doc. 22). Opposition was filed on December 16, 2021, one week after Plaintiff filed its motion and prior to the return date of such motion. It appears to have been completed by Defendant William Swepson in the courthouse on a court-issued form intended for use by self-represented litigants. The blank form William Swepson used was pre-printed with the word "Answer." Swepson had previously filed a timely answer on October 14, 2021 (NYSCEF Doc. 3). Clearly, while the self-represented litigant wrote his argument in opposition on an “answer” form, the content and context of the document were such that it should have properly been uploaded and labeled in NYSCEF as opposition to Plaintiff's motion. The opposition should have been read by the Court as such. The Court notes that Plaintiff filed a reply to the opposition.

The Court notes that, although defendant Thomas Swepson generally assents to plaintiff's recitation of the familial transfer upon the death of his sister, the record before the Court does not include certified or otherwise admissible copies of the several deeds submitted. The Court takes William Swepson's Answer as a general denial of all of Plaintiff's assertions, thus necessitating

¹ This Court was first made aware that the referee had issued a report when a copy of same was annexed as an exhibit to Plaintiff's motion (Mot. Seq. 2), which appeared on the October 12, 2023 Part 75 Calendar.

submission of proof of Plaintiff's contentions, in admissible form. Plaintiff's papers are devoid of competent evidence in admissible form demonstrating that partition and sale of the subject premises is favorable to partition-in-kind. Particularly in light of the statutory preference for physical partition (*see* RPAPL §§ 915 and 921), the Court does not find that Plaintiff satisfied its *prima facie* burden in that regard.

Despite Plaintiff's submission of several exhibits that are inadmissible and thus insufficient, the Court believes that should it deny plaintiff's motion in its entirety, the parties would be deprived of the ability to proceed in a manner which obviates the need to further delay a determination of their respective interests in the property. To that end, the Court cannot proceed without receiving determinative documentary evidence. Such evidence-gathering is best received in a manner determined by a referee appointed for that purpose.

Should the referee appointed to hear and report establish the respective interests of the parties in the property at issue and determine that collectively they are the only parties in interest, the referee may then proceed to weigh the feasibility of partition-in-kind or partition by sale and shall report same to the Court.

The Court further notes that, inasmuch as the parties did not execute the requisite stipulation permitting a referee to "hear and determine" the issues for which the reference was made, any reference herein should have been to "hear and report."

For the reasons stated above, Plaintiff's motion is granted only to the extent as follows:

IT IS HEREBY ORDERED that Stephen R. Markman, Esq., an attorney with offices at 90 Broad

Street, Suite 1700, New York, New York, phone number of (718) 858-9676, and e-mail address of stephen@markmanlaw.com be and hereby is appointed as Referee in this matter, for the purpose of hearing and reporting on (1) the parties' respective ownership interests in the property identified as 704 Midwood Street, Brooklyn, New York (Block 4805, Lot 17), including how such interests were derived, and (2) hear and receive evidence on the feasibility of partition-in-kind versus partition by sale; and it is further

ORDERED that the Referee shall fully comply with the provisions of Judiciary Law § 35a and shall be entitled to a reasonable fee for his services herein, to be determined by subsequent Order of the Court; and it is further

ORDERED, that Mot. Seq. 2 is denied without prejudice, subject to further proceedings to be had herein.

The Court will enter this decision and order on even date. Plaintiff shall serve a copy of this order along with notice of entry on all parties within 10 days of the date of this order.

DATED: October 27, 2023

ENTER:



HON. ROBIN S. GARSON, A.J.S.C.

**HON. ROBIN S. GARSON
A.J.S.C.**