

Fusco v Danton

2023 NY Slip Op 34280(U)

December 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 526609/22

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of December, 2023.

P R E S E N T:

HON. RICHARD VELASQUEZ,

Justice.

-----X

LAWRENCE FUSCO,

Plaintiff,

- against -

Index No. 526609/22
Motion seq 1,2

ANNETTE DANTON, JESSE FUSCO, ANNA FUSCO
and MARION FUSCO,

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) _____

10-19, 23 24, 26, 29

Opposing Affidavits (Affirmations) _____

24, 26, 29 30

Upon the foregoing papers in this family dispute regarding ownership of the house at 1615 73rd Street in Brooklyn (Block 6192, Lot 86) (Property), Plaintiff Lawrence Fusco (Lawrence or Plaintiff) moves (in motion sequence [mot. seq.] one), by order to show cause (OSC), for an order: (1) determining that the Property is "Heir Property" pursuant to RPAPL § 993 (3) (b); (2) issuing a finding that Lawrence is the owner and holder of an undivided one-third (1/3) interest in the Property, pursuant to RPAPL § 993 (7) (a); and (3) issuing notice regarding the time and place of the settlement conference mandated under RPAPL § 993 (5), the purpose of the settlement conference and the statutory requirements, including the determination of the Property's fair market value, pursuant to RPAPL § 993

(6), and the partition and buy-out procedures, pursuant to RPAPL § 993 (7) (*see* NYSCEF Doc No. 23).

Defendants Annette Danton (Annette), Jesse Fusco (Jesse), Anna Fusco (Anna) and Marion Fusco (Marion) (Defendants) cross-move (in mot. seq. two) for an order: (1) dismissing the complaint for partition of the Property; (2) denying Lawrence's OSC and finding that: (a) the Property is not an "Heirs at Law Property," (b) Lawrence is not an owner and holder of an undivided one-third (1/3) interest in the Property, (c) Lawrence does not hold a fee simple interest in the Property, and (d) a mandated settlement conference is not warranted; (3) determining that Lawrence holds a remainder interest in the Property subject to the life estate of Annette Danton; and (4) cancelling the notice of pendency filed against the Property (*see* NYSCEF Doc No. 24).

Background

On September 13, 2022, Lawrence commenced this action for partition of the Property, his deceased parents' residence, by filing a summons and a complaint verified by counsel against Annette, his sister, her son Jesse and his wife Anna and Marion, Lawrence's sister-in-law (NYSCEF Doc Nos. 1 and 2). Two months later, on November 14, 2022, Lawrence filed a notice of pendency against the Property (NYSCEF Doc No. 9).

The complaint alleges that Defendants reside at the Property, while Lawrence resides in Pennsylvania (NYSCEF Doc No. 2 at ¶¶ 1-5). The complaint further alleges that:

"By Deed dated November 27, 1997 in Reel 4072, Page 0431, in the Office of the City Register, Kings County, the real property . . . was deeded by Rose Fusco, as surviving tenant by the entirety of Anthony Fusco to Rose Fusco *and Defendant*

Annette Danton, as life tenant, and to Plaintiff and Defendants David Fusco and Annette Danton, as remaindermen and tenants in common. A copy of the Deed is attached as Exhibit A.¹

“By Correction Deed dated December 3, 1997 in Reel; 4077 Page 0065, in the Office of the City Register, Kings County, the description of the real property . . . was corrected. A copy of the Correction Deed is attached as Exhibit B.

“By Deed dated March 13, 2020 at CRFN 2020000151080, in the Office of the City Register, Kings County, the real property . . . was deeded by Defendant Annette Danton to herself, *as life tenant*, and to herself and Defendants Jesse Fusco and Anna Fusco, as remaindermen as joint tenants with rights of survivorship. A copy of the Deed is attached as Exhibit C.

“By Deed dated December 17, 2021 at CRFN 2022000034646, in the Office of the City Register, Kings County, the real property . . . was deeded by Marion Fusco and Jesse Fusco, as sole heirs at law and distributees of David Fusco Defendant Annette Danton to Defendant Marion Fusco, as life tenant, and to herself and Defendants Marion Fusco, Jesse Fusco and Anna Fusco, as remaindermen as joint tenants with rights of survivorship. A copy of the Deed is attached as Exhibit C.

“On July 29th, 2015 Rose Fusco passed.

“Plaintiff and Defendants are now each vested [a]n undivided fee simple absolute interests in the Property as Tenants in Common.

“Plaintiff is vested and possesses an undivided one-third Tenancy in Common interest in and to the Premises.

“Defendants Marion Fusco and Annette Danton are vested and possess an undivided one-ninth Tenancy in Common interest in and to the Premises.

¹ Although the complaint references deeds to the Property as Exhibits, no such Exhibits are e-filed with the complaint (*see* NYSCEF Doc No. 2).

“Defendants Jesse Fusco, and Anna Fusco are vested and possess an undivided two-ninths Tenancy in Common interest in and to the Premises” (*id.* at ¶¶ 8-16).

The complaint asserts two causes of action: (1) for partition of the Property by judicial sale, and (2) to quiet title to the Property.

On November 11, 2022, Defendants answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that this action is premature because Lawrence has a remainder interest subject to Annette Danton’s life estate, and thus, is not entitled to partition of the Property (NYSCEF Doc No. 7 at ¶¶ 32-34). Defendants also asserted a counterclaim against Lawrence for failure to contribute towards the carrying charges for the Property (*id.* at ¶ 36).

Lawrence’s OSC

On December 14, 2022, three months after commencing this partition action, Lawrence moved, by OSC, for his ultimate relief – partition and sale of the Property, pursuant to RPAPL § 993 (NYSCEF Doc No. 23). Lawrence submits a four-paragraph moving affidavit in which he asserts *and admits* that:

“Plaintiff seeks partition of the . . . property . . . owned by the Plaintiff with a one-third interest, Marion Fusco and Annette Danton each with a one-ninth interest and Jesse Fusco and Anna Fusco each with a two-ninth interest. *Defendants Annette Danton and Marion Fusco possess both the aforesaid remainder interest as well as a purported life estate interest in the Premises.*

“There is no agreement binding myself and the Defendants which govern the partition of the Premises.

“I am informed that RPAPL 993 protects co-tenant such a[s] Plaintiff from the losses being incurred as a consequence of Defendant refusal to list and sell the Property. The anticipated

interest rate increase environment in the current real estate market may be jeopardizing our ability to take advantage of current market conditions” (NYSCEF Doc No. 11 at ¶¶ 2-4 [emphasis added]).

Thus, Lawrence specifically admits that Annette Danton has a life estate in the Property.

Lawrence submits an attorney affirmation, which reiterates the assertions in Lawrence’s moving affidavit (NYSCEF Doc No. 12), and a memorandum of law arguing that “[t]he Property indisputably is ‘Heirs Property’” under RPAPL § 993 as “it is held: (i) by tenants in common with no agreement binding all co-tenants in the event of partition; (ii) by at least one co-tenant who acquired title from a relative; and (iii) 20% or more of the interests are held by co-tenants who are relatives” (NYSCEF Doc No. 20 at 4).

While Lawrence specifically admits in his affidavit that “Annette Danton and Marion Fusco possess both [a] remainder interest as well as a purported life estate interest in the Premises” (*id.* at 5), he simultaneously argues in his moving brief that this partition action is “not defeated” by Annette Danton’s life estate based on the Second Department’s holding in *Feiner v Wolgemuth* (10 AD2d 175 [1960]) (*id.* at 5). Lawrence asserts that he is entitled to partition and sale “subject to the life estate” of Annette Danton without explaining how Annette Danton’s life estate can be preserved if the Property is sold:

“When the movant in partition has a present ownership interest, like Lawrence, a partition action is allowed, *so long as it is subject to a life estate for Annette Danton*. Plaintiff holds a fee interest in the Premises, as a tenant in common along with Defendants, thus he can ask for the partition and sale, *subject to the life estate*” (*id.* at 6 [emphasis added]).

Defendants’ Opposition and Cross Motion

Defendants oppose Lawrence's OSC for partition and sale of the Property and cross-move for dismissal of the complaint and for findings regarding the parties' respective interests in the Property.² Defendants submit an attorney affirmation (NYSCEF Doc No. 29) and a memorandum of law arguing that this partition action *is not ripe* for adjudication because Annette Danton holds a life estate in the Property and Lawrence, at best, is a remainderman (and does not hold an estate *in possession*), as evidenced by the November 27, 1997 deed (NYSCEF Doc No. 27 at 4-5 and NYSCEF Doc No. 16).

Defendants explain that "Danton is entitled to possession of the Property under the life estate created by Rose Fusco's November 1997 deed[,] "Plaintiff's interest only will ripen into ownership of the Property upon the termination of Danton's life estate" and Lawrence failed to demonstrate that his mother, Rose Fusco, had a will naming him as a devisee, or that she died intestate. As such, Defendants argue that Lawrence has not demonstrated that he has any current interest in the Property, but rather, the record evidence reflects that Lawrence received a remainder interest from his mother in the 1997 deed (NYSCEF Doc No. 27 at 5-6).

Defendants assert that dismissal is warranted under the Fourth Department's holding in *Soper v Soper* (222 AD 103, 105 [1927]), a factually identical case, in which the court held that sale of property in a partition action was prohibited absent the life tenant's consent. Defendants contend that Lawrence is not entitled to partition because he holds a future estate, a remainder interest, which is "one of expectancy rather than

² Notably, Defendants do not cross-move regarding their counterclaim against Lawrence.

enjoyment” (*id.* at 7). Defendants also assert that Lawrence is improperly relying on RPAPL § 993, a new statute enacted to combat property theft:

“Notably, Plaintiff cites RPAPL § 993, the relatively ‘new’ New York adoption of the Uniform Partition of Heirs Property Act. The New York statute only came into effect on December 6, 2019, and due to the Covid-19 pandemic, it has been analyzed only by a handful of cases. Nevertheless, the overriding understanding of the cases is that RPAPL § 993 was designed to combat real estate speculators from purchasing a stake in property after it was inherited by one family member, and then seeking to force a partition and sale, often for much less than the actual value of the real property. See N.Y. Senate Sponsor Memo, S. 4865A” (*id.* at 7).

Lawrence’s Opposition

Lawrence, in opposition, submits an attorney affirmation arguing that the 1997 deed in which Rose Fusco granted her daughter, Annette Danton, a life estate does not warrant dismissal “due to the existence of the March 13, 2020 deed executed by the Defendant Annette Danton . . .” extinguishing her life estate (NYSCEF Doc No. 30 at ¶¶ 5-6).

Discussion

RPAPL § 901 (1) allows a person who holds and possesses property as a tenant in common, a joint tenant, or one who has an estate in inheritance, to bring an action for the partition of real property, and for sale if a partition cannot be made without great prejudice to the owners. If, however, the person holds a “future estate” in such property, partition may only be made “subject to the interest of the person holding the particular estate” (RPAPL § 901 [2]).

In *Soper v Soper* (222 AD 103 [1927]), like here, the subject property (two houses) was devised to the children of the testatrix as tenants in common, but one house and lot

was devised to one of the children for life. The life tenant, who, like Annette Danton, was in possession of the property, refused to consent to a partition sale of the house. Like Lawrence, the plaintiff in *Soper* was not in possession of that portion of the property subject to the life estate and had no right to possession of that property until the termination of the life estate. Applying controlling Court of Appeals precedent, the Fourth Department held that “[a]t common law an action for the partition of real property could not be maintained by a remainderman seized of an estate subject to a life estate in a tenant in possession” (*id.* at 104 [citing *Sullivan v Sullivan*, 66 NY 37 (1876)]). The court held that “a remainderman could not compel a partition and sale while a life tenant was in possession” (*id.* at 104).

The Fourth Department noted that the Court of Appeals has repeatedly upheld dismissal of partition complaints “if it were found that an actual partition could not be had without great prejudice to the parties [and] a sale could not be decreed” (*id.* at 105). The appellate court further explained the logic for this holding:

“The reason for prohibiting a sale in such an action was stated in *Sullivan v Sullivan* (*supra*), as follows: ‘[t]here are obvious reasons why a remainderman should not, especially as against tenants in possession, whether of a term for years, for life or in fee, be entitled to institute the proceeding. Any partition which might be made at his instance, although equal when made, might be very unequal when his estate should vest in possession. So, too, if actual partition could not be made, and a sale should be necessary, the tenants having a less estate than a fee might be deprived of the substantial benefit of their terms’” (*id.* at 105-106).

Contrary to Lawrence’s contention, *Feiner v Wolgemuth* (10 AD2d 175 [1960]), a subsequent holding by the Appellate Division, Second Department, does not support Lawrence’s partition action. Unlike here, the plaintiff in *Feiner* sought partition and sale

of that portion of the property that was not subject to a life tenancy, the plaintiff had a “present estate in enjoyment, not in expectancy[,]” and was in possession of the property (*id.* at 179-180). The *Feiner* case is not factually analogous.

Here, Lawrence specifically admitted and acknowledged in his moving papers that Defendant Annette Danton, who resides at the Property, has a life estate in the Property. Lawrences’ hindsight attempt to rescind that admission and argue otherwise in his reply submission is unavailing and rejected. The Court of Appeals has specifically recognized the inequity of permitting a remainderman, like Lawrence, from forcing a partition sale upon Annette Danton, an admitted life tenant in possession of the Property. Consequently, under these factual circumstances, dismissal of the partition complaint is manifestly warranted, as a matter of law. Accordingly, it is hereby

ORDERED that Lawrence’s OSC (mot. seq. one) is denied; and it is further

ORDERED that Defendants’ cross motion (mot. seq. two) is only granted to the extent that the complaint is dismissed, and the notice of pendency filed against the Property is canceled; the cross motion is otherwise denied as moot.

This constitutes the decision and order of the court.

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ, J.S.C.

Hon. Richard Velasquez, JSC

DEC 05 2023