

Gelinas LLC. v Hayes

2023 NY Slip Op 34844(U)

January 6, 2023

Supreme Court, Bronx County

Docket Number: Index No. 800450/2021E

Judge: Kenneth L. Thompson, Jr.

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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

JACQUELINE HAYES,

Present:

Defendants

HON. KENNETH L. THOMPSON, JR.

_____ X

The following papers numbered 1 to read on this **motion to confirm referee report**

No	On Calendar of August 15, 2022	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		motions sequence #3 NYSCEF
Answering Affidavit and Exhibits-----		motions sequence #3 NYSCEF
Replying Affidavit and Exhibits-----		motions sequence #3 NYSCEF

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

Plaintiff moves to confirm the referee’s report dated June 28, 2022, and for the entry of a judgment of partition and sale. Defendant cross-moves pursuant to CPLR 4313 and CPLR 4403 to vacate the referee’s report dated June 28, 2022.

Pursuant to a decision and order of this Court dated April 4, 2022¹, plaintiff’s motion to renew and reargue was granted and upon renewal, plaintiff’s underlying summary judgment, motion this partition action was granted, and an accounting of income and expenses was directed, and a referee was appointed 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.

The referee, consistent with the factual recitation in the decision and order of this Court dated April 4, 2022, has determined that plaintiff and defendant each

¹ Amended by decision and order of this Court dated May 18, 2022, to correct the address of the subject property.

have a 50% interest in the property. With respect to prejudice to defendant, her defense to partition is the “adverse consequences which would befall defendant if partition was ordered,” (*Manganiello v. Lipman*, 74 A.D.3d 667, 669 [1st Dept 2010]), which is not a defense to partition. *Id.* With respect the sale of the property, the referee determined that the property is a single family house and must be sold in one parcel. As to any liens on the property, the referee proposes the following:

I find that in the event any liens are filed and/or docketed against the Premises prior to the closing, which liens are directly related to the ownership thereof, such liens must be paid from the gross proceeds of the sale. I further find that in the event any additional liens are filed and/or docketed against the interest of one of the parties hereto prior to the closing, which lien or liens are unrelated to the ownership of the Premises, such liens must be paid from the percentage of the net proceeds of sale to which the party against whom such lien exists would otherwise have been entitled.²

The Court approves the referee’s proposal for attributing the disposal of liens from the proceeds of the sale of the home.

With respect to an accounting, the referee reports that defendant “has failed to provide an accounting as to the income and expenses, in admissible form,” Defendant submitted an unsworn “accounting” without any receipts or other documentation. As noted in *Messina v. Mayer*, 47 Misc. 3d 1209(A) [N.Y. Sup. Ct. 2015], the spreadsheet reflecting housing expenses was supported by a binder containing all the receipts for the items in the spreadsheet. (*Messina v. Mayer*, 47 Misc. 3d 1209(A) [N.Y. Sup. Ct. 2015]). The referee proposes that “partition

² Notarized referee’s report dated June 28, 2022, paragraphs 8 and 9.

should occur without prejudice to either party's rights to such accounting in this, or a subsequent proceeding.”³ The Court agrees, and such occurrence will allow for defendant to provide an admissible accounting post-sale of the property.

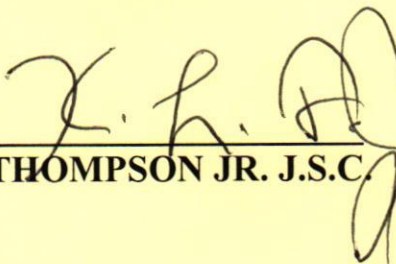
(*McCormick v. Pickert*, 51 A.D.3d 1109 [3rd Dept 2008]).

Accordingly, plaintiff’s motion is granted and defendant’s cross-motion is denied.

The foregoing constitutes the decision of the Court.

Settle order.

Dated: 1/6/2023



KENNETH L. THOMPSON JR. J.S.C.

³ Notarized referee’s report dated June 28, 2022, paragraph 11.