

Diana v Delisa

2012 NY Slip Op 30347(U)

January 27, 2012

Sup Ct, Nassau County

Docket Number: 10-021170

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

ANNA ROSA C. DIANA, a/k/a ANNA ROSA
C. DELISA,

Plaintiff,

-against-

GAETANO DELISA a/k/a THOMAS DELISA
and JOHN DELISA,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 10-021170

MOTION SUBMISSION
DATE: 11-17-11

MOTION SEQUENCE
NOS. 2 and 3

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Notice of Cross-Motion and Affidavit in Support X
- Affirmation in Opposition to Deft's Cross Motion and
In Reply to Plaintiff's Motion X
- Affidavit in Reply to Opposition to Cross-Motion and In
Support of Application for Affirmative Relief X

Motion pursuant to CPLR 3212 by the plaintiff Anna Rosa C. Diana, a/k/a,
Anna Rosa C. Delisa for, *inter alia*, summary judgment: (1) granting her an order
of partition with respect to stated real property; and (2) dismissing the defendant's
counterclaim.

Cross motion by the defendant Gaetano Delisa, a/k/a Thomas Delisa, for an
order, *inter alia*, dismissing the plaintiff's second, and third through seventh
causes of action and for summary judgment on stated claims.

The plaintiff Anna Rosa C. Diana. a/k/a, Anna Rosa C. Delisa [“Anna” or “the plaintiff”] and her brother, the defendant Gaetano Delisa, a/k/a, Thomas Delisa [“Thomas” or the “defendant”], currently own two properties as joint tenants. The two properties include a single-family dwelling located at 379 Hillcrest Avenue, Upper Brookville, New York, and a second, “mixed use” property located at 1849 Bellmore Avenue, Bellmore, New York containing two rental tenancies, one commercial, one residential (Cmplt., ¶¶ 5-10; 11-17; A. Delisa Aff., ¶¶ 2-4; Cmplt., ¶¶ 5; 28-29).

According to Anna, she possesses a 50% joint interest in the Upper Brookville home and a 33% interest in the Bellmore property (A. Delisa Aff., ¶¶ 11-12; Cmplt., ¶¶ 11-12). Notably, Anna contends that Thomas has undertaken control and management of the Bellmore property and maintains the bank account into which rent proceeds were to be deposited (A. Delisa Aff., ¶ 20; Cmplt., ¶¶ 18-19; 20-21).

With respect to the Upper Brookville residence, an attached 1997 form deed contains a type-written provision identifying: (1) the parties’ parents (Frank and Rachel Delisa); Anna; and Thomas as joint, co-purchasers of the property – after which an initialed (in the deed’s left margin), handwritten notation, states: “all as joint tenants with right of survivorship” (Pltff’s Exh., “L”).

After the Delisas acquired the Upper Brookville residence, Anna resided there with Thomas, another brother (codefendant John Delisa), and her parents until 2002, when she married and moved out, although Thomas – upon his 2008 marriage – remained in the home and currently utilizes the premises as his marital residence (A. Delisa Aff., ¶¶ 5-7, 37; Cmplt., ¶¶ 5-7, 13).

In 2008, by which time the parties' parents had both passed away, a series of disputes arose between Anna, John and Thomas with respect to, *inter alia*, the ownership and management of the two properties (Cmplt., ¶¶ 10-11, 16-17).

Anna claims that Thomas – who is the executor of his father Frank Delisa's estate – excluded her from the Upper Brookville premises (Cmplt., ¶¶ 5-8, 28; 31-32). Moreover, Thomas has allegedly refused to account for the rents he has collected from the Bellmore property's two tenants; continually delayed the commencement of probate proceedings which would have facilitated settlement of the parties' interests in the Upper Brookville home; and mismanaged the Bellmore, mixed use property by allowing it to fall into disrepair, and to generate tax liens and violations (A. Delisa Aff., ¶¶ 14-29; Mastroianni Aff., 14-16; 20-24; Cmplt., ¶¶ 14-15, 25-27, 29-30).

Anna further asserts that Thomas has caused a valuable commercial tenant to quit the Bellmore premises, which leasehold is now vacant; that a second,

residential tenant at the Bellmore property has refused to pay rent for several months because needed repairs have not been made; that there is no money in the Bellmore property bank account to pay taxes, make needed repairs; that Thomas has not cooperated in efforts to sell the Bellmore property; and that he has not followed through on alleged promises to purchase Anna's interest in the Upper Brookville residence – which has recently been appraised at some \$950,000.00 (A. Delisa Aff., ¶¶ 29-30; 31; 34-35; Cmplt., ¶¶ 20-23, 25-26, 38-39; Mastroianni Aff., Exh., “D”).

Thomas has denied Anna's claims asserting, among other things, that he did not make all the decisions or act unilaterally with respect to the Bellmore property; that Anna has never made any significant contribution to mortgage or maintenance expenses associated with either of the properties; that he advanced his own funds in connection with the upkeep of the properties; that Anna was not denied access to the relevant bank statements and/or financial information; and that he has, in general, attempted to cooperate with Anna relative to their joint ownership of the properties to no avail (G. Delisa Aff., ¶¶ 2-6; 7-8; G. Delisa Supp. Aff., ¶¶ at 2-4). Moreover, Thomas claims he has been amenable to selling the Bellmore property and is willing to cooperate with the plaintiff with respect to her claim to access to

the Upper Brookville property (T. Delisa Aff., ¶¶ 2-6; 7-8; T. Delisa Supp. Aff., ¶¶ 6-7).

After further negotiations between the parties failed, Anna commenced the within action as against Thomas and John Delisa, who has defaulted in the action (Cmplt., ¶¶ 35-36). Anna's amended, verified complaint contains seven causes of action, including claims for partition in connection with the two involved properties and additional causes of action for, *inter alia*, an accounting; use and occupancy damages; rent allegedly due, and waste.

Thomas has answered, denied the material allegations of the complaint and interposed several affirmative defenses and a counterclaim. The counterclaim avers in sum, that the parties' father made a bequest in his will (not attached by Thomas) leaving his interest in the Upper Brookville home exclusively to Thomas, and that as a result, Anna is entitled to only a 25% interest therein – not the 50% interest she claims to possess. Moreover, the counterclaim further alleges that since Anna allegedly made no contribution towards that property while she resided there, she has therefore been unjustly enriched in an unstated amount (A. Ans., ¶¶ 25-34).

Anna now moves for summary judgment on her first and fourth causes of action for partition and for judgment dismissing Thomas' counterclaim.

Thomas has cross moved for dismissal of the second, third and fifth through seventh causes of action, and also for summary judgment on certain claims for affirmative relief referenced in his notice of cross-motion.

Anna's motion is granted to the extent indicated below. The cross motion is denied.

"Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property" (*Manganiello v. Lipman*, 74 AD3d 667; RPAPL § 901[1] *see also, Trotta v. Ollivier*, ___AD3d___, 933 NYS2d 66 [2nd Dept. 2011]; *Cadle Company v. Calcador*, 85 AD3d 700, 702; *Pando v. Tapia*, 79 AD3d 993, 996; *Buske v. Gannon*, 78 AD3d 634; *Graffeo v. Paciello*, 46 AD3d 613, 614; *Donlon v. Diamico*, 33 AD3d 841, 842).

More specifically, joint tenancies may be severed by a "court-ordered partition that adjusts the rights of the parties and permits * * * sale [of the property] if it appears that a partition cannot be made without great prejudice to the owners" (*Trotta v. Ollivier, supra*, 933 NYS2d 66; RPAPL §§ 901[1], 915; *Graffeo v. Paciello, supra*, 46 AD3d 613, 614; *Donlon v. Diamico, supra*, 33 AD3d 841, 842 *see also, Duffy v Duffy*, 21 AD3d 928, 929). Notably, "partition is

an equitable remedy in nature and Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits” (*Brady v. Varrone*, 65 AD3d 600, 602; *Equity Search, Inc. v. Kao*, 37 AD3d 1105 see, *Buske v. Gannon*, 78 AD3d 634, 635; *Wawrzusin v Wawrzusin*, 212 AD2d 779, 780; RPAPL §§ 943, 945, 1201).

Although the right to maintain an action for a partition is not absolute and is subject to the equities between the parties (*Kopsidas v. Krokos*, 294 AD2d 406, 407), “[a] plaintiff establishes his or her right to summary judgment on an action for partition and sale by demonstrating ownership and right to possession of the property” (*Cadle Company v. Calcador, supra*, 85 AD3d 700, 702; *James v. James*, 52 AD3d 474; *Donlon v Diamico, supra*, 33 AD3d 841; *Dalmacy v. Joseph*, 297 AD2d 329, 330 see also, *McCormick v Pickert*, 51 AD3d 1109, 1110).

With these principles in mind, the Court agrees that Anna has demonstrated her *prima facie* entitlement to judgment as a matter of law with respect to her first and fourth causes of action sounding in partition (*Cadle Company v. Calcador, supra*, 85 AD3d 700, 702; *Shui Ying Lee v. Jing Ting Lee*, 79 AD3d 1123; *James v. James, supra*, 52 AD3d 474; *Donlon v Diamico, supra*, 33 AD3d 841; RPAPL § 901[1]). Specifically, Anna has shown that she is a joint

tenant in both the Bellmore and Upper Brookville properties, “which is all that * * * [she] needed to maintain the present partition action” (*Dalmacy v. Joseph, supra*, 297 AD2d 329, 330). Further, Anna has also made a *prima facie* showing that: (1) the equities favor her position (*James v. James, supra*, 52 AD3d 474; *Donlon v. Diamico, supra*, 33 AD3d at 842); and (2) that a sale of the two properties is warranted since both are “so circumstanced that a partition thereof cannot be made without great prejudice to the owners” (*Cadle Company v. Calcador, supra*, 85 AD3d 700, 702; *Shui Ying Lee v. Jing Ting Lee, supra*, 79 AD3d 1123; *Graffeo v. Paciello, supra*, 46 AD3d at 615).

In opposition to the motion, Thomas has failed to raise a triable issue of fact. Thomas has not argued or established that a sale of the Bellmore property is unwarranted (*Bentley v. Dox*, 12 AD3d 1187). Nor has he offered a sustained, factual theory which would defeat Anna’s *prima facie* entitlement to a sale of the Upper Brookville premises (*see, McCormick v. Pickert, supra*, 51 AD3d 1109; *Donlon v. Diamico, supra*, 33 AD3d 841; *Bentley v. Dox, supra*). Rather, Thomas’ opposing submissions primarily focus upon the dispute between himself and Anna with respect to the maintenance, upkeep and repair, and other costs associated with the two properties.

Turning to Thomas' cross motion, Thomas claims, *inter alia*, that Anna is not entitled to bring an action grounded upon an accounting because he is not a fiduciary (Kreines Aff., ¶¶ 44-45). It is well settled, however, that a claim for an accounting among joint tenants lies in a partition action (*see, Trotta v. Ollivier, supra*, 933 NYS2d at 70; *McCormick v Pickert, supra*, 51 AD3d 1109; *Worthing v. Cossar*, 93 AD2d 515, 517 *cf.*, RPAPL §§ 943, 945, 1201). Indeed, “[a]n accounting is a necessary incident of a partition action” (*Wong v Chi-Kay Cheung, supra*, 46 AD3d 1322, 1322 *see, McCormick v Pickert, supra*, 51 AD3d 1109; *Grossman v. Baker*, 182 AD2d 1119; *McVicker v Sarma*, 163 AD2d 721, 722; *Worthing v. Cossar, supra*, 93 AD2d 515, 517). Accordingly, and at this juncture, Anna's fifth and sixth causes of action which seek, *inter alia*, an accounting with respect to rents allegedly collected by Thomas and an apportionment of those rents, are viable claims – as to which issues of fact exist at this juncture (*Trotta v. Ollivier, supra*, 933 NYS2d at 70).

Similarly, issues of fact exist with respect to Anna's claim that Thomas has committed waste in connection with the Bellmore property by negligently and/or improperly managing, maintaining and/or repairing the premises (Cmplt., ¶¶ 42-43)(*see, McIntosh v. McIntosh*, 58 AD3d 814 [“A tenant in common “has the right to take and occupy the whole of the premises and preserve them from waste or

injury, * * *"). Nor has Thomas shown his entitlement to dismissal of the second and third causes of action, which demand an accounting and/or rental amounts attributable to the allegedly unauthorized occupancy of Thomas' wife at the Upper Brookville property.

The Court notes that Thomas has also requested certain affirmative relief on his cross motion with respect to the Bellmore property, claiming, *inter alia*, that he is entitled to what he describes as: (1) the "benefit of funds equal to any funds and/or monies or benefit received by the Plaintiff" and (2) further, related relief directing the plaintiff to account to him for "any and all sums that" he should have received "from the accounts maintained with respect to" the Bellmore property (Notice of Cross Motion, ¶¶ [c]-[d]). Putting aside the fact that Thomas' answer does not contain a demand for affirmative relief in connection with the Bellmore property (Ans., ¶¶ 25-34), the record before the Court is plainly insufficient to support any summary disposition with respect to Thomas' claims at this point.

Lastly, that branch of Anna's motion which is to dismiss Thomas' counterclaim should be granted to the extent indicated below.

Specifically, Thomas' counterclaim alleges, in sum, that Anna possesses only a 25% interest in the Upper Brookville home, and additionally, that Anna has been unjustly enriched since Thomas paid the mortgage and related expenses since

1997, while Anna has allegedly made no contributions to the costs associated with the property (Ans., ¶¶ 27-33).

Although Thomas alleges, *inter alia*, that Anna's interest in the Upper Brookville property is actually 25% since the parties' father deeded his interest in the property exclusively to him (Ans., ¶¶ 29-30), the deed by which the parties and their parents originally acquired the property establishes that the parties (and thier parents) took title thereto as joint tenants with a right of survivorship; that upon the death of their parents, who were also joint tenants in the property, the parties herein then became the sole, surviving co-owners of the premises – notwithstanding the alleged bequest made by the parties' father in his last will and testament bequeathing his share of the property exclusively to Thomas (Ans., ¶ 29)(*see, Trotta v. Ollivier, supra*, 933 NYS2d at 69).

Notably, “[t]he right of survivorship has been defined as ‘a right of automatic inheritance’ where, upon the death of one joint tenant, the property does not pass through the rules of intestate succession, but is automatically inherited by the remaining tenant” (*Trotta v. Ollivier, supra*, 933 NYS2d at 69 *see also, Matter of Schrier v Tax Appeals Trib. of State of N.Y.*, 194 AD2d 273, 275; *Gotte v. Long Island Trust Co.*, 133 AD2d 212, 215 *see generally* 30A, Carmody Wait 2d, New York Practice with Forms § 169:111).

However, questions of fact exist at this juncture with respect to that portion of the counterclaim which is predicated upon an unjust enrichment theory of recovery (Ans., ¶¶ 32-34). Specifically, the parties' conflicting claims and contentions relating to the properties cannot be summarily resolved as a matter of law (*see generally, Manganiello v Lipman*, 74 AD3d 667, 669; *Lauriello v Gallotta*, 70 AD3d 1009, 1010; *Wolfe v. Wolfe*, 187 AD2d 628, 629).

In sum, the motion for an order of partition should be granted to the extent that a sale shall be ordered upon confirmation of the report of a referee to be appointed in the order to be settled hereon (*see, Cadle Company v. Calcador, supra*, 85 AD3d 700, 702; *Manganiello v Lipman, supra, Lauriello v Gallotta, supra*, 70 AD3d 1009; *Equity Search, Inc. v. Kao, supra*, 37 AD3d 1105; *Wolfe v. Wolfe, supra*, 187 AD2d 628, 629; RPAPL 911).

The Court has considered Thomas' remaining contentions and concludes that they are lacking in merit.

Settle order on notice.

Dated: January 27, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED
JAN 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE