

Segale v Wendell

2017 NY Slip Op 30574(U)

March 22, 2017

Supreme Court, Suffolk County

Docket Number: 018806/2015

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

INDEX NO. 018806/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 10/27/2016
ADJ. DATE: 02/22/2017
Mot. Seq. 001-MD

MOTION DATE: 10/27/2016
ADJ. DATE: 02/22/2017
Mot. Seq. 002-MD

MOTION DATE: 10/27/2016
ADJ. DATE: 02/22/2017
Mot. Seq. 003-MG

MOTION DATE: 10/27/2016
ADJ. DATE: 02/22/2017
Mot. Seq. 004-MD

ANDREW SEGALE and ALTHEA SEGALE,

Plaintiffs

-against-

AMALIA A. WENDELL; WELLS FARGO BANK, N.A.; PAUL
W. SCALIA and JAMES JACKSON, tenant,

Defendants

DECISION & ORDER

TO:

SAMUEL J. DIMEGLIO JR., ESQ.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiffs dated September 26, 2016 for a default judgment against James Jackson with Exhibits A and B attached thereto; (2) Notice of Cross Motion by Defendants Amalia A. Wendell and Paul W. Scalia dated October 10, 2016 with Exhibits 1 to 3 attached thereto; (3) Plaintiffs' Affirmation in Opposition to Defendants' Cross motion by Samuel J. DiMeglio, Jr., Esq. affirmed on November 15, 2016; (4) Defendants' Reply Affirmation by Vesselin Mitev, Esq. affirmed on November 23, 2016; (5) Notice of Second Cross Motion by Plaintiffs dated December 7, 2016 for summary (6) Notice of Cross Motion by Defendants dated January 26, 2017 with Exhibits 1-3 attached thereto; (7) Plaintiffs' Affirmation in Opposition to Defendants Cross Motion dated February 6, 2017; and (8) Defendants' Reply Affirmation by Vesselin Mitev, Esq., affirmed on February 17, 2017; it is:

ORDERED that the motions (Seq. #001, 002 and 004) by Plaintiffs and Defendants are all denied; and it is further

ORDERED that Plaintiffs' motion (Seq. 003) for summary judgment is granted to the extent that a referee is appointed to ascertain the rights and interests of the parties, and any non parties to this action; and it is further

ORDERED that **Vincent J. Messina, Jr., Esq.** with offices located at

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is hereby appointed referee in this action to hear and report the rights, shares, and interest of the parties to this action in the property described in the complaint and of which partition is sought and to take proof of Plaintiffs' title and interest in the premises and of the matters set forth in the complaint, and to report whether the property, or any part of the property, is so circumstanced that a partition of the property cannot be made without great prejudice to the owners; and it is further

ORDERED that Plaintiffs are directed, **no later than April 12, 2017**, to pay the referee an initial fee of \$500.00 to be credited to Plaintiffs in calculating the distribution of surplus moneys from the sale of the premises, if any; and it is further

ORDERED that the referee is to be paid at a rate of \$350.00 per hour, payable upon the distribution of surplus moneys from the sale of the premises, if any, and upon such prior approval as may under the circumstances be required by 22 *NYCRR Part 36*; if there be no surplus monies from the sale of the premises, or otherwise, said referee's fees are to be a liability to be paid by

Plaintiffs, Andrew Segale and Althea Segal, along with Defendant, Amalia A. Wendell , all jointly and severally; and it is further

ORDERED that the referee is granted leave to make appropriate application(s) to the Court to insure that he is paid the fair value of services rendered; and it is further

ORDERED that all communications between any party and the referee are to be conducted in the same manner as communications with the court, any submissions filed with the referee are to be provided to all other parties contemporaneously and made in the manner prescribed by the referee; and it is further

ORDERED that counsel for the Plaintiffs is directed, **no later than April 12, 2017**, serve upon the referee a copy of the most recent real property tax bill together with a schedule of mortgages and any other encumbrances to the property, including leasehold estates, of which the Plaintiff is aware together with the current principal amount owing on each such encumbrance, if there be any; and it is further

ORDERED that the Defendants to the extent such information has not been provided to the referee by the Plaintiff, is directed to, **no later than May 3, 2017**, serve upon the referee a copy of the most recent real property tax bill together with a schedule of mortgages and any other encumbrances to the property, including leasehold estates, of which the Defendants are aware together with the current principal amount owing on each such encumbrance, if there be any; and it is further

ORDERED that if the referee concludes that a sale of the property, or any part of the property, is necessary, then the referee shall ascertain whether there is any creditor, not a party to this action, who has a lien on the undivided share or interest of any party in the property previously described; and it is further

ORDERED that counsel for the Plaintiffs, **no later than May 3, 2017**, are directed to provide to the referee a partition search from a reputable title or abstract company with all convenient speed, toward the end that the referee report to the court as soon as possible the name of each creditor, if any, whose lien is satisfactorily proved to him, the nature and extent of the lien, the date of the lien and the amount due or to become due on the lien; and it is further

ORDERED that Plaintiffs' attorney, if he has not already done so, is to immediately file a notice of pendency of this partition action as against the subject premises; and it is further

ORDERED that the referee is directed to take proof and report the most recent full assessed value of the premises at issue as reported by the local tax assessor and the current sum of all outstanding encumbrances so the court may determine whether either Plaintiff or Defendant have any monetary equity in the premises and the respective shares each party may have in the property, if any; and it is further

ORDERED that pending the submission of the referee's report further judicial proceedings in this matter are hereby stayed, except to the extent that the application may be made to the undersigned by any party or the referee concerning those matters relevant to the execution and purposes of this order or as is necessary to appeal from this order or other applicable proceeding; and it is further

ORDERED that it shall be the obligation of the referee hereby appointed to insure compliance with *22 NYCRR Part 36*, and make all necessary filings to insure continued compliance with Part 36.

ORDERED that the referee is directed to report to the Court if either Plaintiffs or Defendants fail to timely comply with this order in any part, such report as made upon simple affirmation of the referee, on notice to the parties who have appeared, such report may result in a determination by the Court to immediately discharge of the referee from further obligation to the court, and in the dismissal of the action for default in complying with this order; or the imposition of costs or sanctions as the court, upon due notice and an opportunity to be heard, may thereafter determine is appropriate

DECISION

This action for partition of real property, as provided by Article 9 of the Real Property Actions and Proceedings Law, and for an accounting was commenced by Plaintiffs by filing on October 29, 2015. The first judicial intervention requested by the parties was not until the first motion that was made returnable on October 27, 2016 which have been adjourned by the parties and resulted in successive cross motions as made by the Defendant, the Plaintiff and again by the Defendant. This Court follows the CPLR and the Uniform Rules of Trial Court. The parties, to date, have not.

Plaintiffs move (Mot. 001) for a default judgment against James Jackson, a person whom they allege upon information and belief is/was a tenant. The allegations are insufficient to support a default judgment and the motion is denied, with leave to renew after the report of the referee in partition has been confirmed by the court.

Defendants, Amalia A. Wendell and Paul W. Scalia cross move (Mot. 002) for summary judgement. The motion is devoid of merit and is denied.

Plaintiffs cross move for summary judgment (Mot. 003) Plaintiffs are correct that it remains undisputed between the parties to this action that Plaintiffs are joint tenants by the entirety of the subject property together with Amalia A. Wendell, accordingly this motion is granted to the extent that a referee is appointed to determine the legal right, title and interest of the parties to this action as well as any other person or entity that may have cognizable right or interest in the subject real property.

Defendants, Amalia A. Wendell and Paul W. Scalia cross move (Mot. 004) for the imposition of sanctions upon the failure of the Plaintiffs to follow the CPLR when they filed the cross motion for summary judgement. Both parties have engaged in motion practice that is either outside the practices authorized by the CPLR or advance claims with no legal merit. Accordingly, the motion is denied. However, counsel are advised that legal process, motions, and procedures, are not to be it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. It if further directed that Plaintiffs, who commenced this action more than a year ago, are directed to scrupulously adhere to the requirements of this decision and order as well as the directives of the referee. The failure to do so may result in a dismissal of the action. Similarly, Defendants are directed to assiduously conform to the requirements of this decision and order, as well as all directives of the referee. The failure to do so may result in the imposition of costs and/or sanctions.

The foregoing shall constitute the decision and order of the court.

Dated: March 22, 2017



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION