

**D'Alia v Barone**

2011 NY Slip Op 33294(U)

December 6, 2011

Supreme Court, Queens County

Docket Number: 23444/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS  
Justice

IA Part 2

ESTHER D'ALIA a/k/a ESTHER P. D'ALIA

Index  
Number 23444/11

Plaintiff,

Motion  
Date November 16, 2011

-against-

IRENE BARONE, As Trustee of the  
D'ALIA FAMILY TRUST IRREVOCABLE  
INTER VIVOS TRUST,

Motion  
Cal. Number 6

Defendant.

Motion Seq. No.1

The following papers numbered 1 to 10 read on this motion by plaintiff Esther D'Alia, also known as Esther P. D'Alia for an order granting a preliminary injunction enjoining defendant Irene Barone, as Trustee of The D'Alia Family Trust Irrevocable Trust from precluding plaintiff from exercising her rights as the holder of a life estate from entering, using and occupying the premises located at 52-28 69<sup>th</sup> Street, Maspeth, New York, during the pendency of this action, and suspending and removing defendant Irene Barone as Trustee, and appointing the alternative Trustee Diane D'Elia during the pendency of this action.

Papers  
Numbered

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Reply Affirmation-Exhibit(A).....	8-10

Upon the foregoing papers it is ordered that this motion is decided as follows:

On January 28, 2009, Joseph D'Alia and his wife Esther D'Alia, also known as Esther P. D'Alia, created the D'Alia Family Trust Irrevocable Inter Vivos Trust, naming their daughter Irene Barone as Trustee, and their daughter Diane D'Alia as the alternative Trustee. At the time of the creation of said trust, the trust estate consisted of the real property known as 52-28 69<sup>th</sup> Street, Maspeth New York, which was transferred by deed by Joseph D'Alia

and Esther D'Alia, to Irene Barone, as Trustee of the D'Alia Family Trust. Said real property, referred to in the trust instrument as the Trust Premises, is a two-family home, and is presently occupied by month-to-month tenants. The trust instrument provides that until the death of the survivor of the grantors, "[t]he Grantors shall have the right of exclusive use and enjoyment of the Trust Premises, without the requirement of any bond or other security", and that Irene Barone, as Trustee, "acknowledges JOSEPH D'ALIA AND ESTHER D'ALIA as the life tenants of such real property or any property substituted therefor as provided herein".

Joseph and Esther D'Alia moved into 69<sup>th</sup> Street property in 1958, at which time it was owned by other family members. It is alleged that Joseph and Esther D'Alia inherited said real property in 1989. Joseph and Esther continued to reside in the property until 2005. In 2005, Esther D'Alia and her son-in-law Joseph Barone, Sr. purchased a two-family house located at 60-05 75<sup>th</sup> Street, Middle Village, New York. Esther D'Alia has resided in the 75<sup>th</sup> Street property since 2005. Her daughter Irene Barone resides with her husband in a separate apartment at the 75<sup>th</sup> Street property. Joseph D'Alia died on June 18, 2009.

Plaintiff Esther D'Alia commenced the within action on October 13, 2011. In her first cause of action, plaintiff alleges that she is the sole life estate holder of the 69<sup>th</sup> Street property under the subject Trust; that the Trustee Irene Barone has illegally and improperly administered the Trust; that the Trustee has precluded plaintiff from her right to exclusive use and enjoyment of said premises; that the Trustee has received rental income that is payable to the Trust and maintaining the funds for her own use; and that the Trustee has permitted the Trust property to incur violations and has not investigated or remedied the same. Plaintiff seeks to remove Irene Barone as Trustee, and replace her with the Alternate Trustee, Diane D'Alia.

The second cause of action alleges that the real property known as 60-05 75<sup>th</sup> Avenue, Middle Village, New York, although not incorporated into the Trust, is real property that is properly encompassed by the Trust, pursuant to the Trust instrument. The second cause of action does not specify any relief.

The complaint does not allege a cause of action for an accounting, for declaratory judgment, for a permanent injunction, or for attorney's fees.

The complaint's wherefore clause, however, seeks the removal of Irene Barone as Trustee; an accounting by the Trustee for her financial management of the Trustee assets while Trustee; adjudging Esther D'Alia's second property known as 60-05 75<sup>th</sup> Avenue, Middle Village, New York to be incorporated into the Trust; enjoining Irene Barone, "permanently and pending the hearing of this action" from "interfering with the Trust and plaintiff's right to peacefully use and occupy the subject property, and from selling, disposing of, encumbering or pledging any of the property constituting the corpus of the Trust, or from receiving or paying out any of the moneys or assets thereof or disposing of, selling, appointing, mutilating or otherwise interfering with the books, records, vouchers, papers and documents having reference to the Trust"; requiring that the Trustee deliver and pay over to the Alternate Trustee, when appointed, all money and property of the Trust; and awarding costs, disbursements and attorney's fees.

Plaintiff, in the within order to show cause dated October 18, 2011, seeks to enjoin Irene Barone, as Trustee of the D'Alia Family Irrevocable Inter Vivos Trust, from precluding her from exercising her rights as a holder of a life estate from entering, using and occupying the Trust premises located at 52-28 69<sup>th</sup> Street, Maspeth, New York during the pendency of this proceeding; and suspending or removing Irene Barone as Trustee, during the pendency of this proceeding.

Plaintiff states in her supporting affidavit that due to a decline in rental income, and the loss of her husband's benefits following his death, she informed her daughter Irene Barone, the Trustee, that she wished to vacate her apartment in her current home, rent out that apartment, and move into the basement apartment in the Trust premises. She states that the Trust property does not have a mortgage, and the two apartments in the 69<sup>th</sup> Street property are rented and generating income. She asserts that the Trustee objected to this plan, on the grounds that the basement apartment is not a legal apartment. Plaintiff states that she informed the Trustee that the basement apartment "was grand fathered and legal, and that until a judge said otherwise she had no basis to keep me out." She also asserts that as neither of the tenants in the 69<sup>th</sup> Street property have a lease, she could terminate their occupancy at will. Plaintiff states that the Trustee refused to accede to her plans and called the police to keep her from entering the Trust property on September 23, 2011.

Plaintiff further alleges that she has an absolute right to live in the Trust property until she dies, and that Irene Barone

is unfit to remain as Trustee, as she has disregarded the language of the Trust, has been receiving rental income payable to the Trust and keeping it for her own use, and has allowed violations totaling thousands of dollars to accumulate against the Trust property.

Defendant Irene Barone, Trustee, states in her opposing affidavit that each month she collects the rents from the Trust property, and that the Trust makes a payment toward her mother's mortgage obligation on the 75<sup>th</sup> Street property where she resides. She further states that her mother does not pay the full monthly amount due on the mortgage, as she and her husband pay a portion of the mortgage on her mother's behalf. She states that she has never used Trust money to pay for anything that did not benefit her parents, the grantors.

Ms. Barone states that recently her mother, who is 79 years old, informed her that she wanted to sell the Trust property and move to Florida, and then changed her mind and informed her that she wanted to move into the basement of the Trust property. She stated that although the basement had previously been rented, it was no longer occupied, and that it was an illegal apartment. Ms. Barone states that she recently contacted an engineer, but has not been able to obtain permission to remedy the defects in the property, and that the Trust lacks the funds to legalize the apartment.

Ms. Barone states that she has no objection to her mother living in the legal apartments in the Trust property, but that she cannot allow her to occupy an illegal basement apartment that does not comply with the building code; that she changed the locks to the premises after she discovered a mattress on the floor of the basement apartment and learned of her mother's intention to occupy the same; and that her mother has contacted the police on several occasions, and made bogus claims against her husband; and that her mother has sought orders of protection in the Family Court against her and her husband. Defendant states that her mother has instructed the tenants of the Trust property to pay the rent directly to herself in violation of the Trust instrument, and that her sister, Diane D'Alia, has improperly deposited rental checks into her personal account.

Plaintiff in her reply papers attaches a temporary order of protection which she obtained against her daughter Irene Barone, dated October 24, 2011, which remains in force until April 13, 2011. The order of protection recites that the petition was filed in Family Court, Queens County, on October 21, 2011.

A party moving for a preliminary injunction "must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position'" (*EdCia Corp. v McCormack*, 44 AD3d 991, 993, [2007], quoting *Apa Sec., Inc. v Apa*, 37 AD3d 502, 503, [2007] see *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517, [1981]). The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442, [1995]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (see *Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807[2006]).

Plaintiff has not demonstrated that she is entitled to a preliminary injunction. Notably, the complaint does not allege any cause of action to enforce her rights under the Trust instrument. To the extent that Esther D'Alia asserts that she is a life tenant and the holder of a life estate in the Trust property, defendant does not dispute that plaintiff is a life tenant and has a right to reside in the legal apartments within the 69<sup>th</sup> Street Trust property and to seek to terminate the tenancies of the current tenants. The law is clear that "[a] life tenant is tantamount to the owner of the property and is entitled to all of the benefits and burden of such ownership although not a fee ownership, so long as the remainder interest is not affected" (*Matter of Fisher*, 169 Misc. 2d 412, 413 [1993]; see, *Matter of Gaffers*, 254 App Div 448 [1938]; *Thorn v Stephens*, 169 Misc. 2d 832 [1995]). A life tenant can exclude others from possession during her life time (*Matter of Carey*, 249 AD2d 542 [1998]). A life tenant can lease property to a tenant, subject to his life estate, and collect rents (*Matter of O'Donnell*, 240 NY 99 [1925]; *Boyar v Goodman*, 202 AD2d 541 [1994]; *Matter of Fisher*, 169 Misc. 2d 412 [1996]). The court notes that the Trust instrument gave the Grantors the right to "exclusive use and enjoyment" of the Trust premises and also refers to them as the life tenants.

Plaintiff's right to reside in the Trust property, however, necessarily presumes that such occupancy is legal. Contrary to plaintiff's assertions, the documentary evidence submitted herein does not establish that the 69<sup>th</sup> Street property is a legal three-family house. Rather, the documentary evidence presented establishes that said property is a legal two-family house, and that three-family homes are not permitted in the zoning district where the property is located. There is no evidence that the subject property was "grand fathered" as a legal three-family home, or that it is presently capable of conversion to a three-

family home, absent a variance from the Zoning Resolution. The New York City Department of Buildings rejected an application to legalize said building as a three-family home on August 6, 2010, as a 3-family residential building is not permitted in an R4-1 zoning district. Regardless of plaintiff's personal desires, the basement apartment is presently an illegal apartment, and the court cannot countenance plaintiff's proposed occupancy of the basement as her residence. That branch of plaintiff's motion which seeks a preliminary injunction, therefore, is denied.

With respect to plaintiff's request to temporarily suspend or remove Barone as Trustee and to appoint the Alternate Trustee, Diane D'Alia, during the pendency of this action, the court finds that the plaintiff's claim that Ms. Barone misappropriated rental income payable to the Trust, is unsubstantiated. Defendants' claim that Diane D'Alia misappropriated Trust income is also unsubstantiated. The court notes that as Esther D'Alia is a life tenant, she is entitled to collect the rent from the tenants at the 69<sup>th</sup> Street property and to distribute said funds. The trust instrument does not reserve to the Trustee the right to collect rents.

However, it is undisputed that after the Trust was created, five notices of violation were issued by the City of New York, Department of Buildings against the 69<sup>th</sup> Street property. Ms. Barone, as Trustee apparently defaulted in appearing at the Environmental Control Board hearing dates, and penalties were imposed on August 21, 2009 in the sums of \$8,000.00 and \$6,000.00; on December 30, 2009 in the sum of \$4000.00; and on May 10, 2010 in the sum of \$24,000.00. Ms. Barone states that she is aware of these fines, and asserts that they were incurred due to the illegal occupancy of the basement apartment. These notices of violation were issued well after Ms. Barone became the Trustee, she offers no excuse for her defaults before the agency, and does not state whether any of these fines have also resulted in Civil Court judgments against the Trust.

Furthermore, in view of the demonstrated antagonisms between the Trustee Irene Barone, and the Grantor and life tenant Esther D'Alia; the Trustee's admission that those antagonisms resulted in her changing the locks to the Trust property, which interfered Mrs. D'Alia's right to enter and occupy the Trust property; and as the existence of the order of protection demonstrates that future cooperation is unlikely, that branch of plaintiff's motion the Trustee, Irene Barone, is temporarily removed, and the Alternative Trustee Diane D'Alia shall serve as Trustee, pending the resolution of this action.

Accordingly, that branch of plaintiff's motion which seeks a preliminary injunction is denied and that branch of plaintiff's motion which seeks to remove Irene Barone as Trustee of the D'Alia Family Trust Irrevocable Inter Vivos Trust, and to temporarily appoint Diane D'Alia as Trustee, pending the determination of this action, is granted.

Dated: December 6, 2011

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J.S.C.