

**Varriale v D'Amico**

2018 NY Slip Op 30903(U)

May 8, 2018

Supreme Court, Suffolk County

Docket Number: 05467/2015

Judge: William G. Ford

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD  
JUSTICE of the SUPREME COURT

Motion Date: 12/22/16 - 001  
Motion Date: 09/07/17 - 002  
Motion Adjourn Date: 08/10/17 - 001  
Motion Seq #: 001 & 002 - Mot D

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MARIE L. VARRIALE,  
Plaintiff,

PLAINTIFF'S ATTORNEY:  
GOLDSTEIN, RUBINTON, GOLDSTEIN &  
DiFAZIO P.C.

-against-

By: S. Russ DiFazio, Esq.  
18 West Carver Street  
Huntington, NY 11743

VINCENT D'AMICO,  
Defendant.

DEFENDANT'S ATTORNEY:  
STEVEN J. HOMAYOON, ESQ.  
7 Gatelot Avenue  
Lake Ronkonkoma, NY 11779

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Read on this motion seeking partition and sale of real property and *pendente lite* relief, Affirmation of J. Edward Gathman Esq., Affidavit of defendant Vincent D'Amico, and by Order to Show Cause, Cross-motion seeking an Interlocutory Order directing sale of the premises; Affirmation of S. Russ DeFazioEsq., Affidavit of Marie L. Varriale, Affidavit of Vincent D'Amico in opposition, Reply Affirmation of J. Edward Gathman Esq. , Reply Affirmation of S. Russ DeFazioEsq.

**ORDERED** that the motions are determined as outlined below.

**BACKGROUND**

This action seeking partition of real property arises from a joint tenancy of property situate in the Town of Huntington, County of Suffolk, more specifically known as 67 Centershore Road, Centerport ("Subject premises"). The parties first acquired title as joint tenants via deed dated May 31, 2003 indicating a transfer of title from Marie Varriale to Marie Varriale and Vincent D'Amico. According to a title report dated June 9, 2017, a mortgage in the amount of \$203,000.00 dated January 23, 2004, made by the parties herein was recorded.

The parties then executed an "Agreement for joint ownership" [sic] dated January 24, 2004 concurrent with a refinancing of the property. The agreement purported to distribute the proceeds of the refinancing with \$32,000.00 going to Marie Varriale, and \$10,000.00 going to Mr. D'Amico. It recites that these amounts are in full settlement for outstanding monies and work performed by both parties since January 1999. It further purports to indicate that it entitles both parties to one-half interest in said house.[sic]

The agreement goes on to address Dissolution of Property stating: “the house may be so disposed of in two years by June 2005 be advertised for sale. In the event one party does not choose to reside in the house, the remaining party agrees to pay the mortgage and all the house-hold expenses. In the event both parties remain in the residence as is currently arranged the mortgage and household expenses are to be shared. This agreement also includes 50% ownership of 17' Key West motor boat, which now is in sole ownership of Vincent D'Amico. Boat is to be sold at same time of house sale. The Agreement is subscribed by both parties and notarized. The above-referenced title report also reflects a deed from Marie L. Varriale as to her 50 % interest as joint tenant with Vincent D'Amico to Marie L. Varriale and Vincent D'Amico as tenants in common.

For his part, Mr. D'Amico opposes the immediate appointment of a referee, averring that at least since February 2007, he has borne the costs of the mortgage exclusively. According to his affidavit his expenses in that regard total over \$286,000.00. His affidavit further indicates that plaintiff has paid utilities for some period of time, but any utility payments are unsubstantiated by either party. He further avers that the transfer of March 17, 2015, which purported to transfer Ms. Varriale's 50% joint interest to the two parties as tenants-in-common, was without his knowledge or consent.

Neither party has explained or mentioned any rental income from the property, nor has either party, explained other carrying costs, i.e. insurance, taxes, repairs, or mortgage interest and property tax payments and any income tax deductions arising therefrom, if any, in whole or in part.

### DISCUSSION

RPAPL § 901(1) provides: “A person holding and in possession of real property as a joint tenant or a tenant in common, in which he has an estate of inheritance... may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.” A party jointly owning real property with another may, as a matter of right, seek a partition of the property or a partition and sale when he or she no longer wishes to jointly own or use the property (*Manganiello v Lipman*, 74 AD3d 667, 905 NYS2d 153 [1st Dept 2010]). If plaintiff demonstrates her ownership and the right of possession of the subject property and that a partition cannot be made without prejudice to its owners, she is entitled to judgment, as a matter of law, on her partition and sale action, unless a triable issue of fact is raised by a defendant (*see Galitskaya v Presman*, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; *Donlon v Diamico*, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]). While an agreement between the parties not to bring an action for partition is a good defense to such an action (*see McLoughlin v McLoughlin*, 67 AD3d 751, 889 NYS2d 610 [2d Dept 2009]), it is well settled that if the agreement is not in writing, its enforcement is barred by the statute of frauds (*see Goldberg v Goldberg*, 173 AD2d 679, 570 NYS2d 333 [2d Dept 1991]; *Casolo v Nardella*, 193 Misc 378, 84 NYS2d 178 [Sup Ct., 1948], *affd* 275 AD 502, 90 NYS2d 420 [3d Dept 1949]).

Partition, although statutory, is equitable in nature (*see Koniosis v Tsororos*, 83 AD3d 665, 920 NYS2d 403 [2d Dept 2011], and the court “may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale” (*Freigang v Freigang*, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]; *see also Berlin v Wojnarowski*, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a co-tenant (*see Worthing v Cossar*, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). Thus, the court is obligated to ensure that there is an accurate accounting before entry of an interlocutory judgment directing a sale of the property (*see* RPAPL §§

911, 915; *Colley v Romas*, 50 AD3d 1338, 857 NYS2d 260 [3d Dept 2008]; *Donlon v Diamico*, 33 AD3d 841, *supra*).

Before a partition may be directed, a determination must be made as to the rights, shares, or interests of the parties and, in those cases wherein a sale is demanded, rather than an actual physical partition, whether the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners (*see* RPAPL § 915). Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; *Hales v Ross*, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011]; *see also Lauriello v Gallotta*, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; *Wolfe v Wolfe*, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report (*see* RPAPL § 911; § 907; *Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]; *see also Colley v Romas*, 50 AD3d 1338, *supra*). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interest in the premises is also required and, if there be any such creditors, proceedings thereon must be held as required by RPAPL § 913. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference and the proceedings required thereon, a finding to that effect should issue.

Although it seems clear to the Court that both parties desire partition, and whether as joint tenants or as tenants in common the action may be maintained, *Levy v. Herson* 486 NYS 2d 860, the real contention appears to be what monies would be due each of the respective parties. Further, the agreement between the parties, to the extent that it has not expired by its own terms, contemplates sale rather than acquisition or buy-out by one of the parties. Further, the agreement by its own terms states: "In the event both parties remain in the residence *as is currently arranged* the mortgage and household expenses are to be shared." [Emphasis supplied] The agreement does not by its terms define "shared". Defendant would seek to have this court enforce the agreement in his favor because he avers that his "share" of expenses has been greater. This Court however is constrained by the language of RPAPL and finds that both parties are tenants in common and that a physical partition of the property does not appear to be possible.

### CONCLUSION

Accordingly, the Court finds that before any Interlocutory order can issue, a Referee must be appointed to determine the rights, shares and interests of the parties and any creditors.

Therefore it is;

**ORDERED** that **John L. Juliano Esq.** Fiduciary ID14492, with offices located at **39 Doyle Court, East Northport NY 11731 (631)-499-9300**, is hereby appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the parties to this action in the property described in the complaint filed in the above entitled action in which partition and sale is sought, and an abstract of the conveyances by which the same are held, and to take proof of the plaintiffs' title and interest in the subject properties, as well as, those of the other parties to the action, if any, and of the several matters set forth in the complaint such as, the value of the repairs made thereto, and the insurance, taxes and other expenses of the subject premises as may have been paid by the parties, after affording such parties an opportunity to account for such items, and to report on

these matters; and to report whether the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without real prejudice to the owners, and if said appointed referee arrives at the conclusion that a sale of the properties, or any part thereof, is necessary, then said referee is to 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; which report is required prior to the issuance of an interlocutory judgment and it is further; and it is further

**ORDERED** that within thirty days of the date of this order, plaintiff shall serve upon the Referee a search certified by the Suffolk County Clerk of any and all liens outstanding against the subject property; and if the referee ascertains the existence of at least one creditor or non-party creditor, said referee shall cause a notice in the form set forth below to be published once in each week for four (4) successive weeks in the **NEWSDAY NEWSPAPER** requiring each person not a party to this action who, at the date of this order, has a lien upon any undivided share or interest in the property to appear before the referee at a specified place and on or before a specified day to prove his or her lien and the true amount due to him or her by reason thereof and to further serve all such named party creditors with such notice by mail at such creditor's last known address, if known to the referee, not less than twenty (20) days prior to the specified hearing date; and it is further

**ORDERED** the Referee shall serve notice of all hearings to all parties joined to these actions regarding the matters referred to above referee not less than 20 days prior to the hearing date of the RPAPL § 913 hearing date and is empowered to conduct such further hearings on like notice to the parties with respect to issues related to the other matters embraced by the reference framed above; and it is further

**ORDERED** that the notice to nonparty creditors required by RPAPL § 913, if any, shall issue by the referee in the following form:

**SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF SUFFOLK**

-----X  
**MARIE L. VARRIALE,**

**Plaintiff,**

**Index No. 05467/2015**

**-against-**

**VINCENT D'AMICO,**

**Defendant.**

-----X

Assigned to:  
Justice Ford

TO ALL CREDITORS NOT PARTIES TO THE ABOVE ENTITLED ACTION WHO HAVE LIENS ON THE UNDIVIDED SHARE OR INTEREST OF ANY PARTY:

PLEASE TAKE NOTICE that each and every person whether a party or not a party to the above entitled action who, at the date of the order appointing the undersigned referee namely, \_\_\_\_\_ (date) had a lien upon any undivided share or interest of a party in the property hereinafter described, is hereby required to appear before the undersigned at \_\_\_\_\_ (address), \_\_\_\_\_ (city), New York, on or before \_\_\_\_\_ (date), to prove such lien and the true amount due or to become due by reason thereof.

The properties herein are described in the complaint as follows: \_\_\_\_\_

DATED: \_\_\_\_\_ (Referee).

and it is further,

**ORDERED** that the Referee shall report to the Court as to all matters embraced by the reference contained herein, and specifically shall account for any and all rental income, and shall be authorized to determine which party or parties obtained tax benefits from the property ownership and in what share, and shall report with all deliberate speed, following the hearings conducted, and it is further

**ORDERED** that pursuant to CPLR 8003(a), the compensation of the referee herein appointed is fixed at the rate of a reasonable hourly fee not exceeding \$250.00 per hour and the calculation thereof shall be included in the report of the referee and supported by an affirmation of services which shall be attached to said report and served upon all parties, and the compensation of the referee, as fixed and determined by the court, shall be assessed against the parties as directed by the court in a subsequent order; and it is further

**ORDERED** that pursuant to 22 NYCRR § 36.1, the referee herein appointed shall be subject to Part 36 of the Rules of the Chief Judge; and it is further

**ORDERED**, that by accepting this appointment, the appointee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointments based on compensation"), and if the appointee is disqualified from receiving an appointment pursuant to the provisions of Part 36, the appointee shall notify the appointing Judge forthwith.

The foregoing constitutes the decision and Order of this Court.

Dated: May 8, 2018  
Riverhead, New York

  
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HON. WILLIAM G. FORD, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION       X  NON-FINAL DISPOSITION