

IGS Realty Co, LP v Brady
2018 NY Slip Op 31093(U)
May 23, 2018
Supreme Court, New York County
Docket Number: 159554/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IGS Realty Co, LP,

Petitioner,

-against-

James Brady, Jane Brady, Studio 450, LLC, 505 Event Spaces, Inc., 450 West 31st Owners Corp. a/k/a 450 West 31st Street Owners Corp, People's United Financial Inc., Bank of Smithtown Financial Services, Inc. a/k/a Bank of Smithtown, Linda Kramer, Priscilla McGeehoh, Desiree Greene, Christina Hunter, Karen Atta, Bill Smith, Jim Franco, Molly Blieden, Owain Hughes, Jon Chodosh, Stanley Kaufman, Kaufman, Friedman, Plotnicki & Grun LLP, Vincent Hanley, Hanley & Goble, LLP, Jeffrey Katz, Sherwood Equities, Inc., Long Wharf Real Estate Partners, LLC, Dennis W. Russo, Esq., Herrick Feinstein, LLP, Chicago Title Insurance Services, LLC a/k/a Chicago Title Insurance Co., Frank McCourt and McCourt Global, LLP and John Does Numbered 1 through 10,

Respondents.

Index No.: 159554/2017

DECISION/ORDER

Motion Sequence 002

PAUL A. GOETZ, J.S.C.:

In this judgment enforcement proceeding, petitioner IGS Realty Co. LP, the judgment creditor, moves pursuant to CPLR 2221(a) to reargue its petition which seeks, *inter alia*, the turn-over and sale of any assets owned by respondent James Brady, the judgment debtor, including the shares of stock and leases appurtenant to two units in a commercial cooperative that Mr. Brady owns with his wife, respondent Jane Brady. By judgment dated January 30, 2018, this court denied the petition based on its view that petitioner was improperly seeking to satisfy the judgment from Ms. Brady's share of the sale proceeds. Hence petitioner now also moves to amend its petition pursuant to CPLR 3025 to clarify that it only seeks to satisfy its judgment from the judgment debtor's share of the proceeds and not from Ms. Brady's share.

Respondent James Brady, who appears *pro se*, opposes the petition and seeks a stay of any further enforcement proceedings against him pending disposition of an appeal of the order awarding attorneys' fees to petitioner in the underlying case, *IGS Realty Co. v. James H. Brady*, Index No. 603561/2009 (Sup. Ct. N.Y. Cty.), and argues that the jury verdict in the underlying matter is unsupported by the evidence. Mr. Brady does not address the motion to amend in his opposition papers nor does he address, in any of his papers, the issue raised in the court's January 30, 2018 judgment. None of the other respondents submitted papers in this proceeding.

"Whether to entertain reargument is committed to the sound discretion of the court" (*Rostant v. Swersky*, 79 A.D.3d 456 [1st Dep't 2010]). Because petitioner has shown that the court overlooked and misapprehended certain aspects of its original petition and because petitioner clarifies its requests in its amended petition, reargument is granted. In addition, since leave to amend a pleading should be freely given absent prejudice to an opposing party and no prejudice is shown here, petitioner's motion to amend is also granted *nunc pro tunc* (*Oil Heat Inst. of Long Island v. RMTS Assocs. LLC*, 4 A.D.3d 290 [1st Dep't 2004]). Accordingly, the court will decide this proceeding based on the amended petition submitted in connection with this motion and the opposition papers and cross-motion filed by respondent James Brady in response to this motion.

Petitioner has established its status as a judgment creditor by submitting the judgment entered on May 31, 2017 against respondent James Brady in the underlying action. Respondent James Brady's arguments against enforcement of the judgment, which essentially dispute the validity of the jury's verdict, are unavailing. These arguments have already been considered and rejected by the trial court in the underlying action, as well as by the First Department, and the court will not reconsider these arguments in this proceeding. Further, respondent James Brady's

cross-motion for a stay of the enforcement proceedings based on his appeal of the order awarding attorneys' fees also lacks merit. Respondent James Brady has not filed a bond pursuant to CPLR 5519(a)(2) in order to stay enforcement of this order; the appeal concerns an interlocutory order and not the final judgment; and respondent has presented no evidence that permitting petitioner to enforce the judgment would cause prejudice so as to warrant a stay under CPLR 5240 (*Castle Restoration & Const. v. Caste Restoration LLC*, 155 A.D.3d 678, 682 [2d Dep't 2017]). Accordingly, the cross-motion for a stay is denied.

Petitioner establishes, and no other party disputes, that a proprietary lease and 19 shares of stock in 450 West 31st Owners Corp. were issued to James and Jane Brady in or about October 2006 for two commercial cooperative units in the building located at 450 West 31st Street in New York County. Petitioner seeks to satisfy its judgment primarily from the proceeds of the sale of these shares and, pursuant to CPLR 5225, seeks a court order directing the turnover of these shares to the sheriff for auction. As a judgment creditor, petitioner stands in the shoes of the judgment debtor, James Brady, and therefore its interest and ability to seek the partition and sale of the commercial units is no greater than that of Mr. Brady himself (*see Siegel*, New York Practice, § 488 [5th Ed.]). Thus, as a preliminary matter, it is necessary to determine what type of ownership interest respondent James Brady has in the units and whether he can seek partition and sale of the units without his wife's consent.

The court turns to the New York Estates, Powers and Trusts Law for guidance on this issue. Generally, a disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared otherwise, and is therefore subject to turnover, sale, partition and distribution since tenants in common have the equivalent of individual ownership in their proportionate share of the property (EPTL § 6-2.2[a]; *Myers v. Bartholomew*, 91 N.Y.2d 630,

632-633 [1998] [holding that in a tenancy in common, each cotenant has an equal right to possess and enjoy all or any portion of the property as if the sole owner]). However, if the property at issue is considered real property or shares of stock in a cooperative apartment corporation, then under EPTL § 6-2.2(b) & (c), the disposition of the shares to Mr. and Ms. Brady would be considered a tenancy by the entirety, which is not subject to partition and sale without the consent of the spouse (*Matter of Maguire*, 251 A.D. 337 [2d Dep't 1937]). Here, the property at issue consists of shares of stock in a cooperative commercial corporation, and not a cooperative apartment corporation, and thus the property does not fall under EPTL § 6-2.2(c). The court must next decide whether Mr. Brady's interest in the commercial cooperative corporation should be considered real or personal property in order to determine whether partition and sale is available to Mr. Brady, and by extension, to the judgment debtor, under EPTL § 6-2.2(a) & (b).

The Court of Appeals addressed this issue in *Matter of State Tax Comm. v. Shor*, 43 N.Y.2d 151 (1977), a judgment enforcement proceeding brought under CPLR article 52. The Court was asked to determine whether a judgment debtor's interest in a cooperative apartment was real or personal property for purposes of determining the priority of judgment creditors. The Court stated that “[t]he ownership interest of a tenant-shareholder in a co-operative apartment is *sui generis*” and does not fit neatly into traditional property classifications (*Id.* at 154). In other words, courts must assess on a case by case basis which aspect of the property predominates. In *Shor*, the Court held that “where priorities of judgment creditors are involved, the stock certificate and lease involved in a typical co-operative apartment transaction fit better, legally and pragmatically, although with imperfect linguistic formulation, into the statutory framework governing personal property” (*Shor*, 43 N.Y.2d at 154). However, in other circumstances, courts

have held that the interest should be treated as real property. For example, in *Chiang v. Chang*, 137 A.D.2d 371 (1st Dep't 1988), an action for partition brought by one of the co-owners of a cooperative apartment, the First Department held that the parties' interests in the cooperative apartment should be treated as real property because of the uniform procedural framework available under the Real Property Actions and Proceedings Law, which governs partition of real property.

Unlike *Chiang*, this proceeding does not involve a dispute between co-owners concerning the occupancy rights to an apartment. Although petitioner does seek the partition and sale of the stock and proprietary lease(s) appurtenant to the units, this is only a tangential aspect of the action resulting from the joint ownership of the shares. The primary purpose of this proceeding is the enforcement of a judgment. Just as in *Shor*, petitioner seeks to enforce its judgment pursuant to CPLR article 52 and, like in *Shor*, this enforcement proceeding involves numerous other lien holders and judgment creditors who are named as respondents. Because this case is primarily a judgment enforcement proceeding, and not an action for partition, the court finds that the units should be treated as personal property pursuant to the Court's holding in *Shor*. Accordingly, under EPTL 6-2.2(a), the ownership of the shares will be considered a tenancy in common, subject to partition and sale by the judgment debtor (*Myers v. Bartholomew*, 91 N.Y.2d 630, 632-633 [1998] [in a tenancy in common, each cotenant has an equal right to possess and enjoy the property as if the sole owner]).

"Partition is essentially an action between joint owners for the division of their property between them, according to their respective interests, or, if such division cannot be made, then for a sale and similar division of the proceeds" (*Barton v. Reynolds*, 81 Misc. 15 [Sup. 1913], *aff'd as modified on other grounds*, 158 A.D. 951 [4th Dep't 1913]). Although actions for

partition of estates in real property are more common, the right to seek partition of personal property in an action in equity is uncontrovertedly established in New York (*Chiang*, 137 A.D.2d at 374). In the absence of an agreement or other restriction, partition among joint tenants or tenant in common is a matter of right (*Ferguson v. McLoughlin*, 184 A.D.2d 294, 294 [1st Dep't 1992]). However, the right of partition is not absolute and a court must weigh the individual equities before ordering partition (*Id.*)

Here, petitioner asserts that the value of the judgment-debtor's portion of the shares will be maximized if the sheriff auctions the shares together and respondents have not contested this assertion nor demonstrated any prejudice to the parties that would result from such a sale (*Lane v. Tyson*, 133 A.D.3d 530, 531 [1st Dep't 2015] [holding that tenant in common was entitled to partition and sale of shares of stock in cooperative apartment, where other tenant failed to raise issue of fact contesting assertion that apartment's value was maximized by remaining undivided, or as to prejudice to parties that would result from dividing it]). Thus, petitioner is entitled to the turnover, partition and sale of all of the shares and proprietary lease for the units, with proceeds to be distributed in accordance with the parties' rights. As stated previously, petitioner is not entitled, nor does it seek, to satisfy its judgment from Ms. Brady's share of the proceeds.

In addition to the shares and proprietary lease(s), petitioner seeks the turnover and sale of other real and personal property which Mr. Brady may have an interest in, including two businesses, Studio 450, LLC and 505 Event Spaces, Inc. However, petitioner's request is too vague to be enforced under CPLR 5225. It is unclear from the allegations what interest, if any, Mr. Brady possesses in these businesses or what specific assets petitioner is seeking. This of course is understandable in light of respondents' failure to respond to petitioner's information subpoena, which petitioner seeks to enforce under CPLR 2308(b).

Accordingly, it is hereby

ORDERED that petitioner's motion to reargue the petition is granted; and it is further

ORDERED that the Court's judgment dated January 30, 2018 is vacated; and it is further

ORDERED that the motion to amend is granted *nunc pro tunc*; and it is further

ORDERED that respondent James Brady's cross-motion for a stay of enforcement proceedings is denied; and it is further

ORDERED and ADJUDGED that, pursuant to CPLR 5225(a)-(b), respondents James Brady, Jane Brady, Studio 450, LLC, 505 Event Spaces, Inc., 450 West 31st Owners Corp., People's United Financial Inc., and Bank of Smithtown Financial Services, Inc., turn over the shares and proprietary lease(s) issued by respondent 450 West 31st Owners Corp. to respondents James and Jane Brady, to the New York City Marshal, located at 109 West 38th Street, Suite 200, New York, New York 10018, who shall schedule and conduct a public auction to sell the property and distribute, from respondent judgment-debtor James Brady's share only, the sale proceeds to any judgment creditor or lien holder of Mr. Brady in accordance with the parties' rights; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 5225(c), all respondents shall cooperate in the preparation and execution of any documents necessary to effectuate the turnover, auction and sale of this property; and it is further

ORDERED that pursuant to CPLR 2308(b), respondents James Brady, Jane Brady, and 450 Studio, LLC, shall respond to the information subpoenas issued by petitioner within 30 days of entry of this order or they may be held in contempt of court.

Dated: May 23, 2018


HON. PAUL A. GOETZ