

<b>Velazquez v Velazquez</b>
2018 NY Slip Op 31327(U)
May 23, 2018
Supreme Court, Bronx County
Docket Number: 301713/16
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX – PART 12

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EMILIO VELAZQUEZ, AS ADMINISTRATOR DBN  
OF THE ESTATE OF ISMAEL VELAZQUEZ  
Plaintiff,

Index No. 301713/16

- against -

DECISION/ ORDER

EMILIO VELAZQUEZ,  
Defendants.

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**The following papers, numbered 1 to 6 were considered on the motion for summary judgment and Order to Show Cause:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, annexed Exhibits and Affidavits/ Order to Show Cause	1 - 2
Affirmations in Opposition	3 - 4
Affirmations in Reply	5 - 6

**The motion for summary judgment and the Order to Show Cause are consolidated for disposition:**

Upon the foregoing papers, plaintiff seeks summary judgment, pursuant to CPLR 3212, on his action for a partition of the property located at 685 Cauldwell Avenue, in the Bronx (“subject property”). Plaintiff seeks costs, an accounting, and division of the proceeds between plaintiff and defendant in accordance with their respective 50 percent interest and the accounting. Defendant, by order to show cause dated November 17, 2017, seeks an order joining East Williamsburg Affordable Housing Initiative, LLC (“EWAHI”) as a necessary and indispensable party, pursuant to CPLR 1001[a] and RPAPL § 903; enjoining EWAHI from entering or attempting to enter the subject property, from securing or attempting to secure the subject property by use of any locking device, from representing to any third party that the subject property is for sale, vacant or abandoned, and from taking any action

to harass defendant and his spouse Catalina Velazquez (“defendant’s wife”) or any other occupant of the subject property or their quiet enjoyment of the subject property.<sup>1</sup>

This action pertains to a family dispute over the three family residential property, located at 685 Cauldwell Avenue, in the Bronx. The subject property had been in the parties’ family for 72 years. The property was originally owned by plaintiff’s grandparents, defendant’s parents, the late Emilio Velasquez and Carmen Velasquez, as husband and wife, as tenants by the entirety. When Emilio Velasquez died on September 15, 1971 the subject property became Carmen Velasquez’s outright. Carmen Velasquez died on September 3, 1995 leaving behind sole surviving heirs defendant and his brother, plaintiff’s father, Ismael Velasquez (“Ismael”). Defendant is plaintiff’s uncle. By bargain and sale deed dated, September 5, 1996, the subject property was deeded to defendant and Ismael “each as Tenants in Common and each owning an undivided one half interest.”

From approximately 1986 until his death, Ismael resided in the second floor apartment of the subject property. Ismael’s daughter, Eleana Velasquez (“Eleana”), resided in the third floor apartment of the subject property from approximately 1986 to October 2014, paying a nominal monthly rent of \$300. Currently, the defendant and his wife reside in the first floor apartment of the subject property, and the second and third floor apartments are vacant.

On August 2, 2014, Ismael died intestate survived by three children plaintiff Emilio, Eleana, and Ismael Velazquez, Jr. Plaintiff desired to sell its one half interest in the property. Initially, plaintiff sought to have defendant buy-out its share. To this end, defendant arranged for an appraisal

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<sup>1</sup> A temporary restraining order was granted restraining EWAHI from entering or attempting to enter the subject property, from securing or attempting to secure the subject property by use of any locking device, from representing to any third party that the subject property is for sale, vacant or abandoned, and from taking any action to harass defendant and his wife or any other occupant of the subject property or their quiet enjoyment of the subject property.

of the subject property that was performed by James D. Scagnelli and estimated the fair market value of the subject property at \$300,000, as of November 8, 2014. However, this amount did not take into consideration the costs of remedying and repairing the structural and hazardous conditions observed in the second and third floor apartments, such as roof damage, water damage, mold and the need for new ceilings, walls, floors and windows. On or about February 19, 2015, Eleana, as then-administrator of the Estate of Ismael Velazquez, executed a contract of sale to Ismael in the amount of \$142,000. Defendant never counter-signed the contract and the sale was not finalized over the next 18 months. Plaintiff thereafter found third-party purchasers willing to either purchase the plaintiff's 50 percent share of the property or a 100 percent ownership interest in the property, buying out defendant's share. Defendant, who is elderly and legally blind, wished to remain in his family's property for the balance of his life and was unwilling to sell his share of the property. Moreover, he was either unwilling or unable to purchase plaintiff's share.

On May 5, 2016, plaintiff commenced this action for partition of the subject property or appointment of a Referee to sell the subject property. Defendant served an answer interposing affirmative defenses and a counterclaim for waste, pursuant to RPAPL § 817. Defendant also seeks an accounting and declaratory relief naming him the sole owner of the subject property. With regard to his claim of waste, defendant alleges that Ismael and Eleana, while occupying the second and third floor apartments, respectively, caused extensive damage to the apartments, necessitating repairs and reconstruction estimated at \$136,100 for the second floor and \$166,900 for the third floor, to render the premises habitable.<sup>2</sup> Defendant seeks an accounting on the basis that plaintiff failed to share in the

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<sup>2</sup> Defendant supplies an estimate from HR Construction, dated May 8, 2015, for repairs of the second and third floor apartment.

care and maintenance of the subject property and that since Ismael's death defendant has been solely maintaining the property, including the costs of the upkeep of the physical building, hazard insurance, property taxes, registration costs, exterior brick pointing, boiler maintenance, and water and sewer charges.<sup>3</sup> Defendant contends that because the subject property was appraised at approximately \$300,000 the cost of plaintiff's waste exceeds the value of their interest in the property.<sup>4</sup> Accordingly, defendant argues that plaintiff's interest in the subject property is extinguished by the cost of the waste allegedly committed. Further, defendant seeks dismissal of the partition action, declaratory relief, compensatory damages, costs and attorney's fees.

On or about October 19, 2016, plaintiff filed the instant motion for summary judgment on its partition action. The parties stipulated to several adjournments of the motion for settlement purposes. On or about April 18, 2017, plaintiff entered into a contract of sale to non-party EWAHI. On November 2, 2017 plaintiff's interest in the subject property was sold to EWAHI for \$75,000 and, thereafter, on November 7, 2017, plaintiff served a notice to discontinue the action without prejudice. On November 17, 2017, defendants filed the instant order to show cause seeking joinder of EWAHI and injunctive relief. Defendant rejected plaintiff's unilateral attempt to discontinue the action, pursuant to CPLR 3217, as defendant seeks to proceed on his counterclaims.

Defendant supplies, *inter alia*, the affidavit of his daughter, Yvonne Velazquez ("Ms.

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<sup>3</sup> Defendant in opposition to the plaintiff motion for summary judgment contends that he has paid more than his share of the common charges for the subject property from at least 1996 to present.

<sup>4</sup> The appraisal initially estimated the property's fair market value at \$334,000 prior to having access to the interior of the second and third floor apartments. On November 8, 2014, the appraiser was given access to the apartments which he found to be in a deteriorated condition requiring extensive repairs to the roof, floors, and walls throughout the third floor apartment and cosmetic maintenance in the second floor. The appraiser reduced the subject property estimate value to \$300,000, not including the unknown cost to cure a possible mold condition.

Velazquez”).<sup>5</sup> Ms. Velazquez contends that defendant has been occupying the subject property for approximately 32 years during which time he has solely assumed the financial cost of maintaining the common areas, the utilities, homeowner’s insurance, property taxes, and water charges. Ms. Velazquez contends that even during a period of time from 1980 to 1985, when defendant was not residing in the subject property, he still paid for the subject property’s water charges, property taxes and utilities. Ms. Velazquez argues that neither Ismael nor Eleana contributed to the maintenance of the common areas or carrying costs of the subject property, at any time. Moreover, Ms. Velazquez asserts that when defendant became co-owner of the subject property he undertook to perform repairs at his own expense such as repaving the front sidewalk; installing a new hot water heater and gas furnace; and installing new windows, with the exception of the third floor apartment.

In support of defendant’s order to show cause, Ms. Velazquez avers that the health and safety of defendant and his wife have been placed in jeopardy due to the purported sale of the plaintiff’s interest. Defendant contends that they were not made aware of the sale and that when Eddie Doran, a purported principal of EWAHI, appeared at the property they were required to involve the police to prohibit them from entering the property. In addition, EWAHI issued a lease to an individual named Edward Rivera, who commenced a Housing Court proceeding, in Bronx County, to restore Rivera to possession of the third floor apartment of the subject property. An Order to Show Cause by the Housing Court on November 8, 2017, *inter alia*, ordered defendant to permit Rivera to access the apartment for the limited purpose of obtaining his possessions. Defendant argues that the Housing Court order was procured by fraud as Rivera never maintained possession or occupancy of the

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<sup>5</sup> A power of attorney executed by defendant on July 20, 2015 grants Yvonne Velazquez full and unqualified authority to act as defendant’s agent.

apartment. On November 9, 2017, Rivera and Doran appeared at the subject property and were granted access to the apartment, took photographs, and then left. Ms. Velazquez avers that on a separate date another unknown individual knocked on the defendant's door and that her parents received a telephone call from a locksmith business.

Ms. Velazquez contends that these events have caused her elderly parents, both over ninety years of age, to "live in constant fear that someone will enter their home . . . and do them harm." Ms. Velazquez avers that defendant's anxiety and safety concerns were caused by the steady procession of investors coming to the property and approaching defendant about buying his interest and requests to conduct inspections. Defendant asserts that EWAHI is engaging in deliberate tactics in the hope to cause defendant and his wife to abandon the property and sell for a below fair market value price.

Defendant argues that joinder of EWAHI to this action is required in order to prevent EWAHI from accessing the property in order to make changes to its interior and disrupting the lives of very vulnerable elderly people who would suffer irreparable injury to their fragile emotional and physical health.

EWAHI contends that plaintiff had actual possession of the third floor apartment and therein transferred possession of the third floor apartment to EWAHI by its deed. EWAHI contends that Edward Rivera is not employed by EWAHI and that it leased the third floor apartment to Rivera to occupy, because EWAHI is in the practice of not leaving its properties unattended. EWAHI argues that defendant lacks authority to refuse access to EWAHI, the equal co-owner of the subject property, and Rivera, a tenant. EWAHI asserts that it does not seek to remove defendant from the subject property, rather it intends to repair the second and third floor apartments, occupy and rent the third floor apartment, and share the second floor apartment equally with defendant. Ultimately, EWAHI

seeks to convert the subject property into condominiums allowing for each apartment to be owned separately.

EWAHI maintains that it had no involvement with the individual who appeared at the property on November 15, 2017 or the phone call that defendant received, and that it has proceeded in a professional and respectful manner. EWAHI's principal Doran contends that he is experienced at restoring and renovating properties and that a full renovation of the second and third floors will only cost \$60,000 and would increase the value of the subject property. Doran asserts that based upon his personal observation of defendant's attempts to renovate the second floor apartment, defendant is actively damaging the premises by conducting work without required permits and drilling 8" holes in the joists, to run wires. EWAHI avers that this improper work may compromise the structural integrity of the building.

EWAHI points out that defendant has not been able to maintain homeowners insurance on the subject property due to, *inter alia*, the condition of the property including debris and a broken third floor window. EWAHI contends that it has secured insurance for the property, however the policy is in jeopardy of being cancelled because the insurance carrier requires a visual inspection of the property and defendant has refused to allow EWAHI access to the subject property.

## **DISCUSSION**

### ***Plaintiff's Motion for Summary Judgment***

#### **A. CAUSE OF ACTION FOR PARTITION**

"[A] person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, 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” (*Cadle Co. v Calcador*, 85 AD3d 700, 702 [2d Dept 2011]; Real Prop. Actions and Proceedings Law [“RPAPL”] § 901[1]). The party seeking the equitable remedy of partition must therefore hold or possess legal title and a present right to possession (*see Cadle Co. v Calcador*, 85 AD3d at 702; *Trotta v Ollivier*, 91 AD3d 8, 13 [2d Dept 2011]; *Garland v Raunheim*, 29 AD2d 383, 388-389 [1st Dept 1968]).

“Each tenant in common holds his or her title and interest independently of the other tenants in common. Thus, a tenant in common may transfer, devise, convey, lease, mortgage, or otherwise incumber his interest in the land without seeking the consent or joinder of his co-tenants to the transaction” (3 Warren's Weed New York Real Property § 27.42 [5th edition 2018]; *see I.2.3. Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040, 1042 [2d Dept 2010]). On or about November 2, 2017, plaintiff lawfully divested itself of any present or future interest in the subject property by selling its one-half interest to EWAHI, a third party, for \$75,000.

While defendant contends that EWAHI’s purported deed is “rife with irregularities,” he does not seek to void or set aside the deed to EWAHI, but argues that the irregularities evince EWAHI’s dishonesty. In any event, defendant’s contentions with respect to the deed to EWAHI are unsupported by the record. Specifically, defendant contends that the deed to EWAHI ambiguously sets forth the parties names. “In general, a deed conveying real property must set forth ‘a specific grantor, a specific grantee, a proper designation of the property, a recital of the consideration, and . . . technical operative words’ (*Cohen v Cohen*, 188 App Div 933, 933, 176 NYS 893 [1919]; *see Romanoff v Village of Scarsdale*, 50 AD3d 763, 765, 856 NYS2d 168 [2008]; 43 NY Jur 2d Deeds §§ 9-15)” (*Maurice v Maurice*, 131 AD3d 454, 456 [2d Dept 2015]). Here, the deed accurately reflects the grantors as Emilio Velazquez, Elena Velazquez and Ismael Velazquez, *the heirs at law of Ismael Velazquez*, who

died intestate on August 2, 2014.

In addition, defendant contends that the deed to EWAHI does not accurately set forth the interest being transferred. In this connection, the deed to EWAHI provides that the grantors grant and release to EWAHI “the appurtenances and all the estate and rights of [the grantors] in and to said premises,” and references a legal description of the subject property. The deed further references Emilio Velazquez a “co-owner” whose interest shall not be disturbed by an action for partition during defendant’s lifetime. At the time the deed to EWAHI was executed, the heirs of Ismael Velazquez only possessed an undivided one half interest in the premises referenced therein, thus the only interest the Estate could transfer was this interest (*see Lee v Wiegand*, 28 AD2d 560, 561 [2d Dept 1967]; Real Property Law § 245 “[a] greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed”). Moreover, “a conveyance by one tenant, to which the other has not consented, cannot bind the entire fee or impair the nonconsenting [tenant’s] interest” (*V.R.W., Inc. v Klein*, 68 NY2d 560, 564 [1986]; *see I.2.3. Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d at 1042).

Finally, defendant points out that the deed to EWAHI had not been recorded with the Bronx County Clerk as of the time defendant filed his order to show cause. However, the statute regarding the recording of conveyances of real property does not require that all instruments be recorded, but renders unrecorded deeds “void as against any person who *subsequently* purchases . . . the same real property or any portion thereof . . . in good faith and for a valuable consideration. . . and whose conveyance . . . is first duly recorded” (Real Property Law § 291; *see Ruckstuhl v Healy*, 222 AD 152 [1st Dept 1927][purpose of recording statute is to notify subsequent purchasers and incumbrancers of the rights such instruments are intended to secure]). Thus, a failure to record the deed to EWAHI does

not effect EWAHI's current interest as against defendant.

Accordingly, as plaintiff has no current or future possessory interest in the subject property and, thus, no right or entitlement to seek a partition or sale of the subject property, the action for partition, and the related claims, are dismissed (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996][a court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action that is the subject of the motion before the court]; *Garland v Raunheim*, 29 AD2d 383, 388-389 [1st Dept 1968]). Moreover, defendant's answer sought dismissal of the partition action and plaintiff, by notice of discontinuance, sought to discontinue all claims.

The right to bring an action for partition "like that of other interests in real property, may be limited or surrendered entirely by one tenant in common to the other tenants in common, and when this has been done by agreement it operates as a defense to a partition action brought in violation of such agreement" (*Casolo v Nardella*, 275 AD 502, 504-505 [3d Dept 1949], *lv denied* 275 AD 1009 [1949]). Here, EWAHI waived its right to seek partition against defendant during defendant's lifetime. The deed to EWAHI contained the unambiguous covenant that EWAHI "shall not commence a partition action during the lifetime of co-owner Emilio Velazquez." Thus, even had the partition action not been dismissed, EWAHI could not be continue the claim in its own name.

#### B. DEFENDANT'S COUNTERCLAIMS

Defendant asserts counterclaims against plaintiff for waste, an accounting, reimbursement or a offset for expenditures made in excess of his obligation and a declaratory judgment. "While a court may deny a party's motion for summary judgment and yet search the record to grant summary judgment to the nonmoving party on the same issue, summary judgment may not be granted sua sponte with respect to a separate issue which was not addressed by any party" (*Vinder v Showbran Leasing & Mgt.*,

298 AD2d 325, 326 [1st Dept 2002]). Here, no party has requested summary relief on defendant's counterclaims (*see Vinder v Showbran Leasing & Mgt.*, 298 AD2d at 326; *Andriano v Caronia*, 117 AD2d 640, 642 [2d Dept 1986]). Moreover, in the "furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR § 603) and it appears that there are issues of fact as to such claims that would preclude a finding of summary judgment on this record (*see Andriano v Caronia*, 117 AD2d at 642). The defendant's counterclaims are independent of plaintiff's cause of action for partition (*see Bufogle v Greek*, 152 AD2d 527, 528 [2d Dept 1989]; RPAPL § 817 [an action for waste may be maintained by a tenant in common against his co-tenant who commits waste upon the real property held in common]; *see also Gamman v Silverman*, 98 AD3d 995, 996-997 [2d Dept 2012][tenants in common, absent proof of ouster, equally bear the costs and expenses of maintaining the shared property]; *Brady v Varrone*, 65 AD3d 600, 602 [2d Dept 2009]; *Degliuomini v Degliuomini*, 45 AD3d 626, 629 [2d Dept 2007]; *Kwang Hee Lee v Adjmi*, 936 Realty Assoc., 34 AD3d 646, 648 [2d Dept 2006]; *H & Y Realty Co. v Baron*, 160 AD2d 412, 414 [1st Dept 1990]).

### **Defendant's Order to Show Cause**

#### **A. INJUNCTIVE RELIEF**

The granting of a preliminary injunction is a drastic remedy that should be used sparingly in the sound discretion of the court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Fischer v Deitsch*, 168 AD2d 599, 601 [2d Dept 1990]). "Injunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor" (*Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101, 104-105 [1st Dept 2013]). Thus, even if a movant successfully demonstrates

a probability of success on the merits, injunctive relief will be denied if there is no clear showing irreparable injury and a balancing of the equities in the movant's favor (*id.* at 106 [although Co-op Board likely breached its proprietary lease to Co-op owner, injunctive relief preventing Board from performing repairs was not warranted as the plaintiff failed to show irreparable injury caused by a minor loss of square footage to her apartment and interference with her quiet enjoyment]). "A court evaluating a motion for a preliminary injunction must [also] be mindful that '[t]he purpose of a preliminary injunction is to maintain the status quo [pending trial], not to determine the ultimate rights of the parties'" (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942-943 [2d Dept 2009][internal citations omitted]; *see Fischer v Deitsch*, 168 AD2d at 601).

Defendant's application for injunctive relief precluding EWAHI from, in effect, exercising any possessory interest in the subject property, of which they hold a one half interest, as tenants in common, is denied. "A tenancy in common exists when there is a unity of possession, and a tenant in common has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he or she does not interfere with the right of a cotenant to also occupy the premises" (*Jemzura v Jemzura*, 36 NY2d 496, 503 [1975][citations omitted]). "The distinguishing characteristic of a tenancy-in-common is the right of each cotenant to use and enjoy real property as a sole owner of the property, provided that the other cotenants are not thereby excluded from similar use and enjoyment" (*Caprer v Nussbaum*, 36 AD3d 176, 184 [2d Dept 2006]; *see Makarchuk v Makarchuk*, 91 AD3d 1313, 1315 [4th Dept 2012], *lv den* 19 NY3d 803 [2012]). As defendant has failed to establish that EWAHI has no current interest in the subject property, injunctive relief excluding EWAHI from the subject property would not serve to maintain the status quo, but rather would provide defendant the benefit of sole and exclusive possession of the jointly owned property,

without legal justification (*see Matter of Wheaton/TMW Fourth Ave., LP v NY City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]).

Moreover, defendant's submissions fail to demonstrate that he will suffer irreparable harm in the absence of injunctive relief against EWAHI. Injunctive relief is ordinarily available only to prohibit interference with property or other recognized legal rights, but is sometimes appropriate to prevent emotional distress or mental anguish in special circumstances, such as where the injured party has potential special vulnerabilities (*see Caren EE. v Alan EE.*, 124 AD3d 1102, 1107 [3d Dept 2015]; *Doe v Axelrod*, 136 AD2d 410, 415 [1st Dept 1988]). Evidence of alleged irreparable harm is required and must be supported by non-speculative evidence in the record (*see Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511, 512 [1st Dept 2006]; *Valentine v Schembri*, 212 AD2d 371, 372 [1st Dept 1995]; *Faberge Intl., Inc. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985][proof which rests solely on "speculation and conjecture" was not sufficient to support the grant of injunctive relief]).

Here, the court need not determine whether the threatened harm is sufficient to constitute irreparable injury as a matter of law, as defendant's claim that he will suffer irreparable harm is speculative and unsupported by the record. With the exception of a document confirming that defendant is legally blind, the only evidence of defendant's physical and emotional state is the affidavit of defendant's daughter Ms. Velazquez. Ms. Velazquez's contentions that defendant fears for his life and will suffer irreparable harm if EWAHI is not excluded from the subject property are conclusory and unsupported by evidence. Notably, there is no evidence of any threatening, intrusive or harassing conduct towards the defendant or the subject property causing defendant irreparable harm (*compare McMullan v HRH Constr., LLC*, 38 AD3d 206, 206 [1st Dept 2007] [preliminary injunction sustained where the plaintiff presented evidence of the defendant's "repeated interference with plaintiffs' use and

enjoyment of the premises by, *inter alia*, leaving thereon construction materials and debris, removing fences, obstructing an exit from plaintiffs' apartment"']). In addition, defendant fails to submit any competent evidence of the potential harm to his physical or psychological health.

Moreover, the court is unpersuaded that the potential harm, as alleged by defendant, would be prevented by injunctive relief against EWAHI. Here, the evidence is not conclusive that EWAHI was responsible for the conduct that allegedly caused defendant to fear for his safety. Indeed, Ms. Velazquez indicates that it was the presence of multiple investors interested in purchasing the property that caused defendant's fear. In addition, EWAHI disputes any harassment of defendant and contends that it attempted to work with defendant to create an agreement where they could both peacefully coexist in the premises. EWAHI also disputes any affiliation with the workmen that visited and called the subject property on or about November 15, 2017. Accordingly, it is uncertain whether the proposed injunctive relief would sufficiently prevent the alleged harm (*see Caren EE. v Alan EE.*, 124 AD3d at 1107).

Finally, the record demonstrates that the property was at risk of being uninsured due to a broken window and the presence of debris. Defendant fails to explain why he failed to timely correct these conditions or offer any assurance that he will take action to insure the subject property. In addition, defendant resided in the subject property for approximately the last 32 years, including the period of time the alleged waste took place, yet he fails to address what efforts he took to prevent the second and third floor apartments from falling into disrepair. In this regard, there is evidence of roof damage that resulted in a leak to the third floor ceiling and possible mold. Pertinently, a cause of action for waste is governed by a 3-year statute of limitation (*see State v CSRI LP*, 289 AD2d 394, 395 [2d Dept 2001]; CPLR 214[4]). On the other hand, EWAHI stands ready and willing to insure the



subject property and remedy the outstanding structural concerns, thereby securing the subject property from further harm. Moreover, EWAHI concedes that defendant has an exclusive right to possession of the first floor apartment and asserts that it does not intend to interfere with such right. Accordingly, the preliminary injunction is denied as the defendant has failed to establish that any irreparable harm he would suffer outweighs any harm that the defendant would incur if the preliminary injunction is granted.

## **B. JOINER**

CPLR § 1001 requires the joinder of persons “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.” The joinder rules “serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be ‘embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard’” (*Red Hook/Gowanus Chamber of Commerce v NY City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005], quoting *First Natl. Bank of Amsterdam v Shuler*, 153 NY 163, 170 [1897]). Here, defendant seeks an award of sole title in the subject property (*see* RPAPL § 817 [2], [3]) and a declaratory judgment naming him the sole owner of the subject property. In view of EWAHI’s ownership interest in the subject property, obtained after the commencement of this action, EWAHI is a necessary party (*see Ferrando v NY City Bd. of Stds. & Appeals*, 12 AD3d 287, 288 [1st Dept 2004]; CPLR 1001).<sup>6</sup> Accordingly, it is

ORDERED, that defendant’s order to show cause is granted to the extent that East Williamsburg Affordable Housing Initiative, LLC is joined as a defendant in this action, and the order

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<sup>6</sup> Although this action was commenced on or about May 6, 2016, a notice of pendency was not docketed until November 9, 2017, after EWAHI purchased plaintiff’s interest for \$75,000. The property, according to defendant’s appraisal, was valued at approximately \$300,000.



to show cause is otherwise denied; and it is further

ORDERED, that the temporary restraining order set forth in the order of November 17, 2017 is vacated upon the service of a copy of this order with notice of entry; and it is further

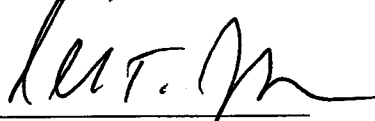
ORDERED, that defendant's counterclaims are severed from the main action; and it is further

ORDERED, that plaintiff's motion for summary judgment is denied and that upon searching the record, plaintiff's complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: May 23, 2018

E N T E R,



Robert T. Johnson, J.S.C.