

Pastorelli v Gallo

2020 NY Slip Op 32776(U)

August 17, 2020

Supreme Court, Kings County

Docket Number: 505197/18

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August 2020

HONORABLE FRANCOIS A. RIVERA

-----X
ANTHONY A. PASTORELLI and JOHN A. ESPOSITO,

Plaintiff,

DECISION & ORDER
Index No. 505197/18

- against -

PETER GALLO and LILLIAN TURRIGIANO,

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of Anthony A. Pastorelli (hereinafter Pastorelli) and John A. Esposito (hereinafter Esposito) (collectively as the movants) for an order: (1) amending the caption to substitute Pastorelli as Guardian of the Personal Needs and Property Management for Esposito as a party plaintiff in place of Esposito individually; and (2) granting summary judgment to the plaintiffs pursuant to CPLR 3212 and ordering that the premises known as 1819 West 8th Street, Brooklyn, New York, be sold at public auction; and (3) directing an accounting by the defendants, and (4) appointing a referee to conduct the sale. The motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Exhibits A to G

BACKGROUND

On March 14, 2018, the movants commenced the instant action by filing a summons, verified complaint and notice of pendency (hereinafter the commencement papers) with the Kings County Clerk's office. On April 11, 2018, defendant Peter Gallo (hereinafter Gallo) filed an admission of service of the commencement papers. On June 26, 2018, the defendants filed a joint verified answer.

The verified complaint alleges the following facts in support of a cause of action for a partition and accounting. Plaintiffs Pastorelli and Esposito and defendants Peter Gallo and Lillian Turrigiano (hereinafter Turrigiano), own in fee and possess, as tenants in common, certain real property, situated in the City of New York, County of Kings, and State of New York, known and described as follows: 1819 West 8th Street, Brooklyn, New York 11223 (hereinafter the premises). Plaintiff Pastorelli owns in fee and possesses one undivided sixth part of said premises; plaintiff Esposito, owns in fee and possesses one undivided sixth part of said premises; defendant Gallo, owns in fee and possess one undivided half part of said premises; and defendant Turrigiano owns in fee and possesses one undivided sixth part of said premises. There are no liens on the premises, and no persons other than the parties have any interest in the premises as owners or otherwise. Defendant Gallo permitted his sister Yolanda Gallo (hereinafter Y. Gallo) to occupy an apartment in the premises and has collected all the rents and profits from her and the other tenants residing in said premises since the 17th day of October 2005, but has not rendered an accounting to the plaintiffs.

MOTION PAPERS

The movants' motion papers included a notice of motion, an affirmation of counsel in support, and seven annexed exhibits labeled A through G. Exhibit A is the deed to the premises. Exhibit B is a statement from TD Bank of a joint checking account of the defendants. Exhibit C is described as a tax bill for the premises. Exhibit D is an order and judgment dated January 23, 2019, which appointed Pastorelli, as Guardian of the Personal Needs and Property for Esposito. Exhibit E is a letter from Bank of America to the defendants regarding a home equity line of credit. Exhibit F is a copy of the summons and complaint. Exhibit G is a copy of the defendants' answer.

LAW AND APPLICATION

Under New York law, joint tenancies may be severed by the court-ordered partition of the property that adjusts the rights of the parties and permits its sale if it appears that a partition cannot be made without great prejudice to the owners (*Trotta v Ollivier*, 91 AD3d 8, 12 [2nd Dept 2011]; *see* RPAPL 901 [1]). Partition is an equitable remedy in nature and the Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits (*Brady v Varrone*, 65 AD3d 600, 602 [2nd Dept 2009], quoting *Hunt v Hunt*, 13 AD3d 1041, 1042 [3rd Dept 2004]). A partition action is equitable in nature, an accounting is a necessary incident thereto (*Tedesco v Tedesco*, 269 AD2d 660, 661 [3rd Dept 2000]). The defendants have not opposed the motion and therefore have not raised a triable issue of

fact in opposition to the plaintiffs prima facie showing on his causes of action for an accounting and a partition and sale of the premises (*see Manganiello v Lipman*, 74 AD3d 667, 669 [1st Dept 2010]; *Donlon v Diamico*, 33 AD3d 841, 842 [3rd Dept 2008]; *Augustus v Mahadeo*, 168 AD2d 658 [2nd Dept 1990]).

Inasmuch as the defendants have not opposed the motion for a partition of the premise, the court can direct a partition and sale of the property, and an accounting as a necessary incident thereto (*Tedesco*, 269 AD2d at 661).

Plaintiff Pastorelli also sought an order amending the caption to substitute him as the Guardian of the Personal Needs and Property for plaintiff Esposito. In support of this branch of the motion he submitted the order and judgment dated January 23, 2019, which appointed Pastorelli, as Guardian of the Personal Needs and Property for Esposito.

Leave to amend a pleading shall be freely given provided that the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party (*see CPLR 3025 [b]*; *Hothan v Mercy Med. Ctr.*, 105 AD3d 905, 906 [2nd Dept 2013]). The defendants did not oppose this branch of the motion. The requested amendment has merit and neither prejudices nor surprises the defendant. It is, therefore, granted.

CONCLUSION

The motion of Anthony A. Pastorelli and John A. Esposito for an order amending the caption to substitute Anthony Pastorelli as Guardian of the Personal Needs and Property of John A. Esposito is granted.

The motion of Anthony A. Pastorelli and John A. Esposito for an order directing an auction of the premises known as 1819 West 8th Street, Brooklyn, New York is granted.

The motion of Anthony A. Pastorelli and John A. Esposito for an order appointing a referee to conduct the sale is granted.

Anthony A. Pastorelli and John A. Esposito are directed to file on the NYSCEF system on or before September 30, 2020 a proposed order, consistent with the decision and order of the Court and reflecting the amendment of the caption.

The foregoing constitutes the decision and order of the Court.

Enter:

Francis A. Rivera

J.S.C.

KINGS COUNTY CLERK
FILED
2020 AUG 25 AM 9:43