

**Lovrich v Lovrich**

2013 NY Slip Op 31568(U)

July 9, 2013

Supreme Court, Suffolk County

Docket Number: 12-11085

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**P R E S E N T :**

**COPY**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 12-28-12 (#001)  
MOTION DATE 3-14-13 (#002)  
ADJ. DATE 4-25-13  
Mot. Seq. # 001 - MotD  
# 002 - XMD

-----X  
CRAIG LOVRICH,  
  
Plaintiff,  
  
- against -  
  
MICHAEL LOVRICH, DEBORAH SCHAUB  
and JOHN LOVRICH,  
  
Defendants.  
-----X

TEDONE & TEDONE, ESQS.  
Attorney for Plaintiff  
983 Willis Avenue  
Albertson, New York 11507

BERKMAN, HENOCH, PETERSON, PEDDY &  
FENCHEL, P.C.  
Attorney for Defendant Michael Lovrich  
100 Garden City Plaza  
Garden City, New York 11530

THOMAS J. STOCK & ASSOCIATES  
Attorney for Defendant John Lovrich  
88 Second Street  
Mineola, New York 11501

SIBEN & SIBEN, LLP  
Attorney for Defendant Deborah Schaub  
90 East Main Street  
Bay Shore, New York 11706

Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 16b; Notice of Cross Motion and supporting papers 17 - 33; Answering  
Affidavits and supporting papers 34 - 38; Replying Affidavits and supporting papers 39 - 41; Other     ; it is,

**ORDERED** that this motion by plaintiff for an Order, pursuant to RPAPL 915, granting plaintiff  
an interlocutory judgment to sell the premises which is the subject of his complaint is determined herein;  
and it is further

**ORDERED** that this cross-motion by defendant Michael Lovrich for an Order, pursuant to CPLR  
3212, granting summary judgment in his favor declaring a portion of the parties' agreement null and  
void is denied; and it is further

KAK

**ORDERED** that Daniel J. Panico, Esq., with an office located at 2 North Cozine Road, Manorville, New York 11949, telephone number (516) 819-3885, is hereby appointed Referee to ascertain and report as to the rights, shares and interests of the parties in the real property described in the complaint; to perform an accounting; and to report whether the property or any part thereof is so circumstanced that a partition of the property cannot be made without great prejudice to the owners, and to take testimony on such matters, if necessary; and it is further

**ORDERED** that the Referee shall be empowered to hold hearings regarding any issues related to the completion of his accounting; and it is further

**ORDERED** that the Referee shall ascertain and report whether there is any creditor not a party who may have or has a lien on the undivided share or interest of any party; and it is further

**ORDERED** that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) (“Disqualifications from appointment”) and section 36.2 (d) (“Limitations on appointments based upon compensation”).

Plaintiff commenced this action in April of 2012 for the partition and sale of certain real property located in the Town of Riverhead, County of Suffolk more commonly known as 261 Williams Way South, Baiting Hollow, New York (District 0600, Section 079.000, Block 05.00, Lot 007.000) (“the premises”); and, for specific performance of an agreement with regard to the distribution of the sales proceeds following the sale of the said real property. Ann Lovrich conveyed the premises by deed dated September 15, 2009, subject to a life estate, to two of her sons, defendants, John Lovrich and Michael Lovrich. Ann Lovrich died on February 16, 2010, survived by her four children (the parties to this action).

On November 1, 2010, the parties to this action executed a “Final and Binding Agreement and General Release” (“the agreement”).<sup>1</sup> Pertinent portions of the agreement state as follows:

In order to avoid the expense and delay of estate litigation, a judicial accounting or litigation over decedent’s property, joint assets and devolution of assets, the undersigned have authorized the settlement of the claims or causes of action and account of proceedings by this agreement.

The intention here is to resolve **everything**, past, present and future: jewelry, the house, bank accounts, assets, attorney’s fees, escrows,

---

<sup>1</sup> The Court notes that defendants John Lovrich and Debbie Lovrich-Schaub executed an “Amended ‘Final and Binding Agreement and General Release’ ” (11/1/10), however, same is of no import inasmuch as it attempts to modify the November 1, 2010 agreement but was never executed by all of the parties to the initial agreement.

house expenses pending closing and expenses of sale and all legal and equitable causes of action.

The consideration is as described below.

If, after signing this agreement and the real estate contract, anybody challenges either agreement, in any way or refuses to perform either agreement, the he or she shall pay the attorney's fee of all other siblings and each of their attorneys.

\* \* \*

#### **PLAN OF DISTRIBUTION**

The first thing that has been done is that a distribution of house contents, jewelry, dolls and all personal property of any kind has occurred and all parties are satisfied with the results.

\* \* \*

The house located at 261 Williams Way South, Baiting Hollow, New York, is being sold to Craig Lovrich for \$305,000, pursuant to a contract between John Lovrich and Michael Lovrich as Sellers; and Craig Lovrich as Purchaser. Craig shall receive a \$55,000 seller's concession credit at closing. After the payment of all expenses of Decedent's estate and the house, the total of the net proceeds of sale and Craig's \$55,000 seller's concession shall be divided equally among the Decedent's four children with Craig's \$55,000 seller's concession being counted as an advance payment of part of his share.

Pending the sale everyone will be dividing the costs of taxes and carrying charges equally from escrow. In the event closing does not occur within 5 months of this date, for any reason whatsoever, all expenses of ownership and maintenance and repair of the property shall be assumed solely by Craig after that date.

The net proceeds of sale shall be deposited to [the attorney's] escrow account for the estate, and after all costs and expenses of the estate, the house and his attorney's fees are paid, the remaining balance plus the \$55,000 credit Craig received at the closing of the house, shall be divided equally among the Decedent's four children, with Craig's \$55,000 seller's concession being counted as an advance payment of part of his share. The parties acknowledge that John and Michael may incur federal and state income tax liability solely as a result of the sale of the house by reason of the fact that it is not their principal residence and that such combined tax liability shall be borne by all of the parties equally. To facilitate same, it is agreed that [the attorney] shall retain the sum of \$25,000 in escrow until the accountants for John and Michael prepare their income tax returns for the year in which the sale occurs and that such additional time as is required to obtain the consent of all of the parties to an equal division of the total tax liability.

\* \* \*

This distribution is approved and accepted by each of the parties as a binding account, final and conclusive as regards all the assets, expenses and convenience accounts comprised in the estate or owned solely or jointly before or after Decedent's death. All agree probate or court proceeding is unnecessary.

\* \* \*

In conclusion, the intent of this agreement is to distribute the property, accounts, house and valid debt equally, regardless of title or possession of the asset. All parties agree to promptly sign all documents necessary to carry out the intent and purpose of this Agreement in the future.

\* \* \*

This agreement may not be changed, modified or rescinded except by a written agreement, signed and acknowledged by all of the parties.

In a contract dated November 1, 2010,<sup>2</sup> defendants John Lovrich and Michael Lovrich agreed to sell plaintiff the premises for the purchase price of \$305,000.00. It stated that there would be "[b]uyer's downpayment [*sic*] by check subject to collection to be held in escrow by Seller's attorney as agent" in the sum of \$5,000.00. Pursuant to the contract, the closing for the premises was to take place "on or about January 4, 2011" and it was subject to a mortgage contingency clause. It also stated that "Sellers, in their sole discretion, shall have the right to extend Buyer's time to obtain loan approval for an additional period up to 15 days following the initial thirty (30) day period, *subject to global agreement.* ... 44. *At closing, Craig Lovrich gets a \$55,000 advance credit. This represents an advance of his distribution under a separate global agreement of this date for his mother's estate and property.*" (Italicized words being handwritten onto contract.)

No closing for the premises ever took place, nor did plaintiff remit the \$5,000.00 down payment check to sellers' attorney. It appears to be undisputed that plaintiff did pay the carrying charges on the premises as of five months after the date of the agreement. On November 22, 2011, defendant John Lovrich conveyed his interest in the premises to plaintiff by bargain and sale deed. The within action was commenced in April of 2012.

Plaintiff now moves for summary judgment and an Order granting an interlocutory judgment pursuant to RPAPL 915 to sell the premises, to appoint a referee to sell and to determine the rights, obligations, and liabilities of the parties, and to enforce the terms of the agreement. Defendant Deborah Schaub joins in that application. Defendant Michael Lovrich cross-moves for an Order granting

---

<sup>2</sup> A contract of sale for the entire premises from defendants John Lovrich and Michael Lovrich to plaintiff dated August 10, 2010, amounts to nothing more than a proposal as the second owner, defendant Michael Lovrich never executed same, and thus, has no bearing with regard to the within determination.

summary judgment pursuant to CPLR 3212 declaring that the portion of the agreement dealing with the sale of the premises and distribution of the proceeds thereof is unenforceable.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Before partition or sale may be directed, a determination must be made as to the rights, shares, or interests of the parties, and whether partition may be had without great prejudice (*Lauriello v Gallotta*, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; *Wolfe v Wolfe*, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). “[Where] there are unresolved factual issues” the grant of an interlocutory judgment of partition is premature because “[b]efore an interlocutory judgment of partition may be made, the court itself must determine these rights and declare what they are” (*Mary George, D.M.D. and Ralph Epstein, D.D.S., P.C. v William Bridbord, D.D.S., P.C.*, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]).

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations (*see W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). “[I]n considering the intention of the parties, a court should read a contract as a whole and consider its various clauses contextually” (*Waverly Corp. v City of New York*, 48 AD3d 261, 264, 851 NYS2d 176 [1st Dept 2001]). The legal principles applicable to the question of whether a contract is divisible are not precise, as it depends largely upon the intention of the parties, which can best be determined by the language employed and the subject matter of the contract (*Equitable Trading Co. v Stoneman*, 131 AD 376, 377, 115 NYS 285 [3d Dept 1909]). Where two contracts are made or where it is clear that the covenants of the contract were independent, the contract is divisible and severable (*see Ludlum v Ferriss*, 224 AD 96, 229 NYS 507 [1st Dept 1928]).

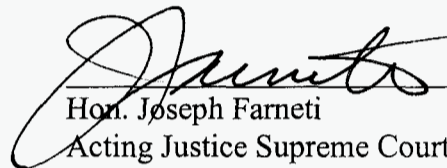
Here, it is clear that plaintiff and defendants entered into two separate and distinct contracts, one with regard to the distribution of the entire estate of their mother (which specifically references the contract of sale), and a second one with regard to the sale of the premises from two of the defendants to plaintiff (which specifically references the agreement regarding the estate). The alleged failure on the

Lovrich v Lovrich  
Index No. 12-11085  
Page No. 6

part of plaintiff to perform in accordance with the terms of the contract of sale does not invalidate the agreement among the four siblings with regard to the distribution of their mother's estate. The November 1, 2010 agreement clearly and unequivocally states that it resolves everything with regard to the distribution of the estate and that "the intent of this agreement is to distribute the property, accounts, house and valid debt equally, regardless of title or possession of the asset." Thus, in keeping with the intent of the parties, it is clear that plaintiff's alleged failure to purchase the premises would necessitate a sale by a referee and distribution of proceeds in accordance with the terms of the agreement.

Accordingly, as no accounting has been completed and the rights, shares, and interests of the parties must be determined in accordance with the agreement and the expenditures associated therewith, the motion by plaintiff for an interlocutory Order appointing a Referee pursuant to RPAPL 915 is granted and the motion is otherwise denied at this time. Defendant Michael Lovrich's cross-motion seeking summary judgment declaring that the portion of the agreement which deals with the distribution of the proceeds of the sale of the premises as unenforceable is denied.

Dated: July 9, 2013

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

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