

Klein v Dooley
2010 NY Slip Op 33142(U)
November 3, 2010
Supreme Court, Suffolk County
Docket Number: 08-27426
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-20-10 (#001)
MOTION DATE 2-11-10 (#002)
ADJ. DATE 9-2-10
Mot. Seq. # 001 - MotD
002 - XMD

-----X	
TIMOTHY EDWARD KLEIN, AS	:
ADMINISTRATOR OF THE ESTATE OF	:
EDWARD T. KLEIN, DECEASED,	:
	:
Plaintiff,	:
	:
- against -	:
	:
EILEEN T. DOOLEY,	:
	:
Defendant.	:
-----X	

Upon the following papers numbered 1 to 25 read on this motion for summary judgment and cross motion to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers 10 - 17; Answering Affidavits and supporting papers 18 - 20; Replying Affidavits and supporting papers 21 - 25; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff Timothy Edward Klein, as Administrator of the Estate of Edward T. Klein, deceased, for an order pursuant to CPLR 3212 granting summary judgment in his favor 1) directing the sale of certain real property held by the parties as tenants in common, 2) declaring the defendant liable to the plaintiff for her exclusive use and occupancy of the subject real property, and 3) for the appointment of a referee to ascertain and report as to the rights, shares and interests of the parties in the real property, is granted to the extent that the Court directs a sale of the real property and the appointment of a referee, and is otherwise denied; and it is further

ORDERED that this cross-motion by the defendant Eileen T. Dooley for an order 1) pursuant to RPAPL 901 (4) and CPLR 3211 dismissing the complaint, and 2) pursuant to CPLR 3212 granting summary judgment in her favor on her counterclaims, is denied and, in searching the record, summary judgment is granted to the defendant as a matter of law and the plaintiff's second cause of action for use and occupancy is dismissed with prejudice, and it is further

a.f.
J.S.C. **ORDERED** that James G. Spiers, Esq. with an office at 214 Roanoke Ave.,
Riverhead, N.Y. 11901 is hereby appointed Referee pursuant to RPAPL 911 to determine the

parties' respective rights, shares and interests in the property, and distribution of any proposed sale proceeds, as well as a presentment of a certified search for creditors pursuant to RPAPL 913; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36); and it is further

ORDERED that the Referee's fees shall be computed pursuant to CPLR 8003.

This is an action for the partition of real property located at 9 Cherokee Trail in Ridge, New York pursuant to RPAPL Article 9 and to recover damages for the defendant's use and occupancy of the premises, giving her credit for one-half of any payments made for legitimate expenses in maintaining the premises. The complaint alleges two causes of action. The first alleges that the plaintiff's decedent and the defendant were the owners as tenants in common of the premises, that the plaintiff now holds an un-divided one-half interest in the premises based on the decedent's interest, and that a partition of the property is not feasible, requiring a sale thereof. The second alleges that the plaintiff was "involuntarily precluded" from occupying the premises by the defendant as of the death of the decedent, his father, in March 1995, and that the defendant is liable to the defendant for the use and occupancy of the premises from that date, less one-half of any payments made by her in maintaining the premises. The plaintiff asserts that partition of the property cannot be made without great prejudice the parties and the defendant does not dispute this assertion.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

In support of his motion, the plaintiff submits his affidavit, the affirmation of his attorney, the pleadings, and a copy of the deed reflecting the purchase of the premises by his father and the defendant. The submission also purports to include a copy of the letters of administration issued to the plaintiff by the Surrogate's Court. Although an exhibit tab is included, the document itself is missing. However, the defendant does not dispute the plaintiff's standing herein. In addition, the record includes a copy of a subsequent motion by the plaintiff before the Surrogate's Court, which establishes his appointment as Administrator of the Estate.

A review of the deed herein reveals that the subject real property was conveyed from an Ann J. Macukas to "Eileen T. Dooley, residing at 177 Park Lane, Middle Island, New York and Edward T. Klein, residing at 177 Park Lane, Middle Island, New York." Generally, a disposition of property to two or more persons creates a tenancy in common, unless expressly declared to be a joint tenancy (*see* EPTL 6-2.2 [a]; *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2003]).

Here, when Edward T. Klein, the plaintiff's decedent, died intestate, title to the parcel automatically vested in his distributees, the plaintiff and his two siblings, as tenants in common with the defendant (*see, Matter of Jemzura*, 65 AD2d 656, 409 NYS2d 445 [1978], *aff'd* 52 NY2d 1067, 438 NYS2d 520 [1981]; *Kraker v Roll*, 100 AD2d 424, 474 NYS2d 527 [1984]; *Matter of Woodcock*, 26 Misc3d 1229A [Sup Ct,

Dutchess County 2010). This vesting by descent occurred by operation of law, irrespective of the apparent failure to appoint an administrator or to file a new deed (see, *Kraker v Roll*, supra).

The plaintiff has established his entitlement to summary judgment on his first cause of action seeking a partition or sale of the property as a matter of right (Real Property Actions & Proceedings Law Article 9; *Donlon v Diamico*, 33 AD3d 841, 823 NYS2d 438 [2006]; *Tedesco v Tedesco*, 269 AD2d 660, 702 NYS2d 459 [2000], *lv denied* 95 NY2d 791, 711 NYS2d 158 [2000]; 24 NY Jur 2d, Cotenancy and Partition §§ 126-131; 3 Warren's Weed NY Real Property, Common Ownership of Real Property § 27.18 [1]-[3]).

The burden then shifted to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). In opposition to the motion, the defendant submits her affidavit, the depositions of the parties, her verified answer, and a letter from her attorney to the mortgagee of the property.

The verified answer sets forth, *inter alia*, the affirmative defenses of unjust enrichment, laches, and equitable estoppel. In addition, the answer sets forth two counterclaims. The first counterclaim seeks to impose a constructive trust on the real property in favor of the defendant. The second counterclaim seeks a partition and sale, in the event that the defendant is not granted affirmative relief herein. In her affidavit, the defendant swears that she had a "marital- type relationship" with the plaintiff's decedent beginning in 1978 until his death in 1995, that they both contributed funds towards the purchase of the real property in 1989, and that they had rented an apartment together before the subject purchase. She further swears that she and the decedent had an agreement that the "survivor between us would automatically retain sole ownership," that she and the decedent believed that they held title to the property on a survivorship basis, and that she paid all of the costs and expenses of maintaining the real property after the death of the decedent. She indicates that she did not learn that there was a problem with her sole ownership of the real property until twelve years after the death of the decedent, when she fell behind in her mortgage payments. In 2007, she applied for a reverse mortgage, which revealed the problem and also brought the issue of ownership to the attention of the plaintiff.

Here, the defendant's counterclaim for the imposition of a constructive trust is barred by the statute of limitations. A determination of when the statute of limitations begins to run depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition, or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property (*Morando v Morando*, 41 AD3d 559, 840 NYS2d 593 [2007]). A cause of action to impose a constructive trust is governed by a six-year statute of limitations and begins to accrue upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered (CPLR 213[1]; *Coombs v Jervier*, 74 AD3d 724, 906 NYS2d 267 [2010]; *Reiner v Jaeger*, 50 AD3d 761, 855 NYS2d 613 [2008]; *Soscia v Soscia*, 35 AD3d 841, 829 NYS2d 543 [2006]).

The record reveals that the plaintiff made a prima facie showing that the action was time-barred by establishing that the cause of action accrued either in 1989, when the decedent and the defendant purchased

the property, or in March, 1995, the date of the decedent's death, when the defendant alleges that she should have acquired the subject property solely in her name, rather than as a co-owner with the plaintiff (*Coombs v Jervier*, *supra*; *Reiner v Jaeger*, *supra*; cf. *Matter of Schwartz*, 44 AD3d 779, 843 NYSd 403 [2007]; *Swift v New York Med. Coll.*, 25 AD3d 686, 808 NYS2d 731 [2006]). The defendant attempts to avoid the effect of the statute of limitations by contending that the plaintiff is equitably estopped from invoking the defense. Under this doctrine, a party is precluded from invoking a statute of limitations defense "where it is the [party's] affirmative wrongdoing. . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Reiner v Jaeger*, *supra*, quoting *Zumpano v Quinn*, 6 NY3d 666, 816 NYS2d 703 [2006]). The record reveals no affirmative wrongdoing on the part of the plaintiff.

In addition, the defendant has failed to raise a material issue of fact regarding any of her affirmative defenses. Accordingly, the plaintiff's motion for summary judgment on his first cause of action is granted.

The second branch of the plaintiff's motion seeks summary judgment declaring the defendant liable to the plaintiff for her exclusive use and occupancy of the subject real property. It is well settled that a tenant in common is not liable to a cotenant for use and occupancy absent an agreement to that effect or an ouster (*see Misk v Moss*, 41 AD3d 672, 839 NYS2d 143 [2007]; *Degliomini v Degliomini*, 12 AD3d 634, 785 NYS2d 519 [2004]; *Corsa v Biernacki*, 2 AD3d 388, 767 NYS2d 855 [2003]). Exclusive possession by a cotenant, alone, is not the equivalent of an ouster (*see, Gonzalez v Gonzalez*, 236 AD2d 589, 653 NYS2d 700 [1997]; *Perez v Perez*, 228 AD2d 161, 644 NYS2d 168 [1996], *lv to appeal dismissed* 89 NY2d 917, 653 NYS2d 920 [1996]).

The events which occurred after the death of the decedent are critical to the issue of ouster and whether or not the defendant is responsible to the plaintiff for use and occupancy of the subject real property. It is uncontroverted that the parties were not aware of the manner in which the real property was held by the decedent and the defendant. In fact, the plaintiff was unaware that his father was an owner of any property at all. In addition, the plaintiff indicates that there has never been a request of the defendant to share possession or occupancy of the subject real property. Generally, ouster requires a written or oral communication of the intent to possess adversely against his or her fellow co-tenant. (*see, Blanchard v Blanchard*, 4 Misc3d 1027[A], 798 NYS2d 343 [Sup Ct, Bronx County 2004]; *Perkins v Volpe*, 146 AD2d 617, 536 NYS2d 845 [1989]). The adduced evidence reveals that the parties never communicated regarding possession of the subject real property. Therefore, the defendant has no liability to the plaintiff for the fair value of the use and occupancy of the premises (*see Goldberg v Ochman*, 143 AD2d 255, 532 NYS2d 166 [1988]; *Degliomini v Degliomini*, *supra*). Accordingly, the second branch of the plaintiff's motion for summary judgment is denied.

In light of the Court's decision to direct a sale of the subject real property, the third branch of the plaintiff's motion for summary judgment must be addressed. It is well settled that "[a] partition action, although statutory, is equitable in nature and the court could compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale" (*Costanza v Galluzzo*, 41 AD3d 414, 835 NYS2d 919 [2007], quoting *Cook v Petito*, 208 AD2d 886, 619 NYS2d 571 [1994]; *see also, Berlin v Wojnarowski*, 32 AD3d 810, 820 NYS2d 855 [2006]; *Lemcke v Lemcke*, 13 AD3d 1062, 787 NYS2d 562 [2004] *Hunt v Hunt*, 13 AD3d 1041, 788 NYS2d 219 [2004], *lv denied* 8 NY3d 812, 836 NYS2d 551 [2007]). In ascertaining the equities involved, an accounting is necessary to assist in determining the parties'

rights, shares and interests in the real property and any sale proceeds (RPAPL 911; *Tedesco v Tedesco, supra*; *Deitz v Deitz*, 245 AD2d 638, 664 NYS2d 868 [1997]). Therefore, the Court directs that the appointed Referee shall determine and report whether there is any creditor, not a party, who has a lien upon the undivided share or interest of any party; and shall determine and report the rights, shares and interests of all parties before interlocutory judgment is rendered.

The defendant cross-moves for an order 1) pursuant to RPAPL 901 (4) and CPLR 3211 dismissing the complaint, and 2) pursuant to CPLR 3212 granting summary judgment in her favor on her counterclaims. The first branch of the defendant's motion is, in essence, based on the contention that, pursuant to RPAPL 901 (4) and SCPA 1901, the plaintiff cannot maintain an action for partition without first obtaining the permission of the Surrogate's Court. The record reveals that the plaintiff failed to obtain such permission in advance of commencing this action. However, on August 16, 2010, the Hon. John M. Czygier, Jr., Surrogate's Court, Suffolk County, granted the plaintiff permission to bring the subject action *nunc pro tunc*. The decision, in part, reads "[the Court has] the limited procedural role of assuring that all the estate's beneficiaries or distributees, as the case may be, receive notice of such application ..." It is clearly the case herein that all of the distributees have adequate notice of the commencement of this action. The defendant fails to cite any authority for her position that this Court lacks jurisdiction once the Surrogate's Court has determined that the action can proceed, albeit in a *nunc pro tunc* order. Accordingly, the first branch of the defendant's motion is denied.

The second branch of the defendant's motion which seeks summary judgment on her counterclaims is also denied. As set forth herein, her first counterclaim for the imposition of a constructive trust is barred by the statute of limitations. In addition, her second cause of action is deemed moot as it requests the very relief granted to the plaintiff in this decision. Accordingly, the defendant's cross motion is denied.

However, the Court finds that its inquiry should not end there. A court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (*Dunham v Hilco Construction Co., Inc.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Yusin v Saddle Lake Home Owners Association, Inc.*, 73 AD3d 1168, 902 NYS2d 139 [2010]). Upon reviewing the entirety of the records submitted, the Court determines as a matter of law that the defendant is entitled to summary judgment dismissing the plaintiff's second cause of action for use and occupancy of the subject real property.

Dated: November 3, 2010


 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION