

**Estate of DeSilva v DeSilva**

2024 NY Slip Op 34052(U)

November 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 522431/20

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 99 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 12th day of November, 2024.

P R E S E N T:

HON. RICHARD J. MONTELIONE,

Justice.

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THE ESTATE OF ELMO DESILVA BY ITS ADMINISTRATOR,  
CARMEN DESILVA,

**DECISION & ORDER**

Plaintiff,

- against -

Index No. 522431/20  
MS#5,6

DAVID M. DESILVA, JENNIFER ISABELL ARMAND,  
GIZELLE ISABELLE ARMAND and ISABEL ADKINS,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_  
Opposition Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

60-68, 71-74  
73, 75-90, 92-95  
75-90, 91, 92-95

KINGS COUNTY CLERK  
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Upon the foregoing papers in this action pursuant to RPAPL Article 15 regarding the real property located at 1248 Prospect Place in Brooklyn (Block 1365, Lot 25) (Property), plaintiff, the Estate of Elmo DeSilva (Estate) by its Administrator, Carmen DeSilva (Carmen DeSilva), moves (in motion sequence [mot. seq.] five) for an order: (1) granting the Estate partial summary judgment for partition of the Property pursuant to CPLR 3212, and (2) “referring this matter to a Referee so that the rights and interests of the parties may be determined . . .” (NYSCEF Doc No. 60).

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Defendant David M. DeSilva cross-moves (in mot. seq. six) for an order: (1) granting him leave to reargue the court's March 1, 2023 decision and order, entered on March 1, 2023, which denied David DeSilva's motion (mot. seq. three) for summary judgment (NYSCEF Doc No. 47), pursuant to CPLR 2221, and, upon reargument, (2) granting him summary judgment dismissing the amended complaint (NYSCEF Doc No. 71).

### **Background**

On November 12, 2020, Carmen DeSilva, as Administrator of her late husband Elmo DeSilva's Estate, commenced this action by filing a summons and a complaint verified by counsel seeking, among other things, partition of the Property (NYSCEF Doc No. 1).

On September 15, 2022, Carmen DeSilva amended the complaint (NYSCEF Doc No. 22). The amended complaint alleges that "Plaintiff and defendants all have ownership interest in the subject premises . . ." because "on November 8, 2019 the parties became owners . . . as sole surviving heirs of their mother, Mildred DeSilva . . ." (*id.* at ¶¶ 8 and 9). The amended complaint alleges that Carmen DeSilva and David DeSilva are joint tenants of the Property, while defendants Jennifer Isabell Armand, Gizelle Isabelle Armand, and Bernadette Isabel Adkins "are the sole surviving heirs of . . . Veronica DeSilva" who "is along with plaintiff and David M. DeSilva one of three children of the deceased Mildred DeSilva, who died intestate . . ." (*id.* at ¶ 10). In

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addition to a declaration of the respective interests of the parties in the Property, the second cause of action seeks partition of the Property and “sale of the real property and a division of the proceeds between the parties in accordance with their respective rights and interests in same” (*id.* at ¶ 16). The amended complaint asserts a third cause of action for “an accounting for all of the monies payable for [David’s] use and occupation of the subject property” (*id.* at ¶ 21).

### ***The March 1, 2023 Decision and Order***

On October 14, 2022, David DeSilva moved (in mot. seq. three) for summary judgment dismissing the complaint (NYSCEF Doc Nos. 26-30). By a March 1, 2023, decision and order, this court denied David DeSilva’s summary judgment motion and held that the parties’ ownership interests in the Property are as follows:

“[Defendant]’s David DeSilva[’s] motion for summary judgment is denied after oral argument on the record. The court holds that the Property is owned 1/3 [by] Estate of Elmo DeSilva, 1/3 [by] David DeSilva and 1/3 [by] the heirs of Veronica DeSilva (post deceased daughter of Mildred DeSilva) (NYSCEF Doc No. 47).

Notably, the March 1, 2023 decision and order was entered and notice of entry was e-filed that same day (NYSCEF Doc No. 45). David DeSilva thus had 30 days from March 1, 2023, or until March 31, 2023, within which to move for leave to reargue (*see* CPLR 2221 [d] [3]).<sup>1</sup>

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<sup>1</sup> CPLR 2221 (d) (3) provides that a motion for leave to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”

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On March 3, 2023, David noticed his appeal from the March 1, 2023, decision and order (NYSCEF Doc No. 46), which he abandoned by failing to timely perfect.

***David DeSilva's Untimely Cross-Motion to Reargue***

On May 14, 2024, *more than one year* after David DeSilva's summary judgment motion was denied, David DeSilva belatedly cross-moved for leave to reargue his summary judgment motion (NYSCEF Doc No. 71). David's untimely cross-motion seeking leave to reargue his summary judgment motion is denied without consideration of the merits. However, the motion papers will be considered in opposition to the plaintiff's motion.

***The Plaintiff Estate's Partial Summary Judgment Motion***

On October 20, 2023, the Estate moved for partial summary judgment on its second cause of action for partition of the Property and the appointment of a referee (NYSCEF Doc No. 71). Carmen DeSilva submits an affidavit attesting that she is the administrator of her late husband, Elmo DeSilva's Estate (NYSCEF Doc No. 62 at ¶ 1). Carmen DeSilva explains that Elmo and David executed a deed erroneously transferring the Property to themselves as joint tenants when their mother, Mildred DeSilva, died (*id.* at ¶ 2). Carmen attests that "this transfer was erroneous as Mildred DeSilva had a third child, Veronica DeSilva, who had predeceased her" (*id.* at ¶ 3). Since the court already determined the ownership interests of the parties in the March 1, 2023 decision and order, including 1/3 owned by the heirs of Veronica DeSilva, Carmen now seeks a sale of the

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Property “so that all the owners can receive their distribution from the sale of the property . . .” (*id.* at ¶ 7).

Plaintiff’s counsel submits an affirmation asserting that partial summary judgment is warranted granting partition and directing a sale because:

“[d]espite the court’s [March 1, 2023] order, the defendant David DeSilva refuses to allow for the sale of the premises or alternatively to purchase the interest of the other owners. He currently resides in the premises and is able to solely enjoy use and occupancy of the premises. (NYSCEF Doc No. 61 at ¶ 9).

Plaintiff’s counsel asserts that it is “undisputed that the subject premises must be sold since it cannot be divided among the parties . . .” (*id.* at ¶ 10).

Notably, defendants, Jennifer Isabell Armand and Bernadette Isabel Adkins submit an attorney affirmation *in support* of the Estate’s motion for partial summary judgment (NYSCEF Doc No. 68).

### **Discussion**

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of

*Estate of E. DeSilva by Its Administrator, C. DeSilva v. DeSilva, D. et al.*, Index No. 522431/2020 fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a *prima facie* showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

RPAPL 901 (1) provides that “[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.” The Second Department has held that the remedy of partition and sale is “always subject to the equities between the parties” (*Tsoukas v Tsoukas*, 107 AD3d 879, 880 [2d Dept 2013]).

Here, the court in its prior order may have erroneously determined the respective ownership interests of the parties in the subject property (Order of March 1, 2023). The original motion by defendant David DeSilva only sought dismissal of the complaint and not a determination of the percentage interest of the parties. Moreover, the deed reflected joint ownership and by operation of law ownership interest of the late Elmo DeSilva may

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have been transferred completely to David DeSilva. *Goetz v Slobey*, 76 AD3d 954, 908 NYS2d 237, 2010 NY Slip Op 06570, 2010 WL 3583413 [2d Dept 2010]. But this is uncertain because *Goetz v Slobey* predates RPAPL 993 and under section 5(e) “Both the plaintiffs and defendants shall negotiate in good faith to reach a mutually agreeable resolution including, but not limited to, *a tenancy in common agreement*...”

Notwithstanding, the court cannot *sua sponte* change its prior order. (*American Home Mortgage Servicing, Inc. v Kaplan*, 227 A.D.3d 647, 211 N.Y.S.3d 153 [2d Dep't. May 1, 2024]).

The court notes that this action was never designated or treated under the Uniform Partition of Heirs Property Act, RPAPL § 993, which clearly applies (*see* Subd. (2)(e)(i)-(iii), A.L.2022, c. 785, § 1; Added L.2019, c. 596, § 1, eff. Dec. 6, 2019. Amended L.2022, c. 785, § 1, eff. Dec. 23, 2022; L.2024, c. 56, pt. O, §§ 10, 11, eff. July 19, 2024.) This act requires a settlement conference.

Based upon the foregoing, it is

**ORDERED** that the Estate’s motion for partial summary judgment in its second cause of action in the amended complaint for partition of the Property (mot. seq. five) is held in abeyance pending the completion of a settlement conference pursuant to RPAPL § 993 (5), and all parties and their counsel are directed to appear for a **settlement conference on December 11, 20234, 3:30 p.m., Part 99, Room 574, Supreme Court, 360 Adams Street, Brooklyn, NY 11201**; and it is further

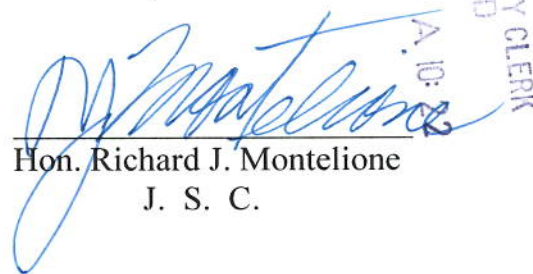


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**ORDERED** that defendant David DeSilva's cross-motion (mot. seq. six) for leave to reargue the court's March 1, 2023, decision and order is denied as untimely.

This constitutes the decision and order of the court.

E N T E R,



Hon. Richard J. Montelione  
J. S. C.

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