

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

-----	Index No. 13862/08
HUGO CHARLES,	Motion
Plaintiff,	Date February 3, 2009
-against-	Motion
ANNE M. CHARLES,	Cal. No. 9
Defendant.	Motion
-----	Sequence No. 3

	<u>PAPERS</u>
	<u>NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits....	1-4
Opposition.....	5-6

Upon the foregoing papers it is ordered that plaintiff's motion by order to show cause is decided as follows:

Plaintiff moves by Order to Show Cause for, *inter alia*, (1) an order vacating the stay of all proceedings in this matter for a period of sixty (60) days to afford defendant an opportunity to obtain new counsel and (2) an order transferring title to the former marital residence located at 101-14 223<sup>rd</sup> Street, Queens Village, New York ("premises"), which is currently held by the plaintiff and defendant as tenants in common, to the plaintiff only, as receiver.

**I. Motion for an Order vacating the stay of all proceedings.**

The affirmation of defendant's attorney submitted in opposition to plaintiff's order to show cause states counsel was retained by defendant on or about January 26, 2009. In an order of this court dated December 15, 2008 all proceedings in this matter were stayed for a period of sixty (60) days from the date thereof to afford defendant an opportunity to obtain new counsel. As defendant has retained new counsel prior to the expiration of the sixty day period, that branch of plaintiff's motion to vacate

the stay of all proceedings is granted and it is hereby ordered that the stay of all proceedings is vacated and lifted.

**II. Motion for an Order transferring title of premises to plaintiff, as receiver.**

The branch of plaintiff's motion for an order transferring title of the premises to plaintiff, as receiver is denied for the following reasons:

**A. Defective and insufficient papers.**

At the outset plaintiff's motion papers are defective and insufficient. No copy of the complaint in this action was appended to the moving papers. The moving papers must disclose a cause of action showing plaintiff is entitled to ultimate equitable relief sought by plaintiff in the order to show cause.

Plaintiff's submissions in support of its order to show cause consisted of plaintiff's attorney affirmation which does not reveal any cause of action or aver personal knowledge of the facts. No affidavit is made by plaintiff, nor is there any affidavit of any other person submitted relative to the facts upon which a cause of action by plaintiff for the equitable relief may be said to exist.

The court is unable to glean from plaintiff's submissions any indication that the nature of the action is one to compel partition and sale of the premises.

Furthermore, beyond the difficulty of even trying to comprehend plaintiff's attorney's argument, the papers submitted by plaintiff fail to elucidate, other than in vague and conclusory terms, any relevant facts that this court could rely upon to render a determination. Plaintiff's counsel's presentation of argument in its papers does little to advance plaintiff's cause where its arguments are based almost exclusively on plaintiff's counsel's conclusory assertions and recitation of what counsel believes to be fact or law with little or no support in the record, or citations to specific exhibits which support plaintiff's contentions.

Accordingly, the motion must be denied for insufficiency of the moving papers, without prejudice to renew upon proper papers.

**B. Insufficient evidence to support granting the relief requested.**

The proponent of a motion carries the initial burden of presenting sufficient evidence to support the relief sought from the court (see *Stahl v Stralberg*, 68 NY2d 320 [1986]; *Alvarez v Prospect Hosp.*, 287 AD2d 613 [2d Dept 2001]). Plaintiff has failed to adduce proof in admissible form sufficient to support the relief requested, having submitted no affidavit by anyone with personal knowledge of the facts (see CPLR 3212). The herein allegations of fact, by an attorney who does not aver such knowledge, amounts to mere unsubstantiated hearsay (*Sloan v Schoen*, 251 AD2d 319 [2d Dept 1998]). It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Wisnieski v Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317 [1st Dept 2002]). An attorney's affirmation consisting of unsubstantiated hypothesis and suppositions, is legally insufficient to support the relief sought by plaintiff in this motion.

**C. Plaintiff fails to set forth the statutory or case law authority for granting the relief sought.**

Although plaintiff's papers vaguely describe the relief he requests, plaintiff fails to set forth the statutory or case law authority for granting such relief. "The court finds it necessary to remind plaintiff's counsel that attorneys are always under an ethical obligation to cite applicable law to the court (Code of Professional Responsibility EC 7-23). An attorney's failure to cite such authority is an abdication of responsibility, undermining the adversarial process and burdening the court unnecessarily." (*Shammah v Shammah*, 2008 NY Slip Op 28479, [Sup Ct, Nassau County, 2008]).

**D. Insufficient evidence to support granting the relief requested.**

As aforesaid, although it is not clear as to the nature of the cause of action in this matter, from the court's review of the papers submitted by the parties and according to the affirmation of plaintiff's attorney, the court gleans that plaintiff is the former husband of defendant and is currently in possession of and a tenant in common of, the former marital

residence (the premises herein) with defendant, his former wife. Apparently, plaintiff seeks to sell the premises before the property is lost to foreclosure sale, however, his former wife purportedly has refused to cooperate in effectuating the sale. The plaintiff moves by order to show cause for an order, *inter alia*, "transferring title to [the premises] from the plaintiff and defendant jointly, as tenants in common, to the plaintiff only, as receiver", "directing the sale of the premises at fair market value", "directing that, upon sale of the premises, all proceeds be deposited into the IOLA account of ... [the] attorney for the plaintiff, ..." to be distributed as directed by the court. According to plaintiff's counsel, the court must grant the relief he requested in order to "save the house from foreclosure, allow the property to be sold and maintain the *status quo* of the parties." (Affirmation of Attorney for Plaintiff, ¶ 13).

In defendant's affidavit in opposition to the motion, she avers that "[i]n reviewing the Order to Show Cause and supporting papers, it is apparent to me that my former husband, Mr. Hugo Charles, may well have forged my signature on any mortgage documents. Thus, all of the relief requested in the Order to Show Cause should be denied in its entirety." (Affidavit of Anne M. Charles, ¶ 6).

On February 3, 2009, the parties appeared for a conference before this court, but were unsuccessful in reaching a settlement. The court notes that at the time of the conference, defendant was represented by counsel.

Notwithstanding the aforementioned deficiencies in plaintiff's papers, it would appear that the nature of the relief being sought by plaintiff could be characterized as a temporary receivership to sell the marital residence for a specific amount (CPLR 6401, et seq.). CPLR 6401 provides that the court "[u]pon motion of a person having an apparent interest in property which is the subject of an action in the supreme \*\*\*court, [may appoint] a temporary receiver \*\*\* prior to judgment \*\*\* where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. \*\*\* The court appointing a receiver may authorize him to take and hold real \*\*\* property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct" (CPLR 6401 [a], [b]).

Notwithstanding, whatever the relief sought by plaintiff is characterized it must be denied. "[T]he appointment of a temporary receiver in a partition action is a harsh remedy, and

courts of equity will exercise extreme caution in doing so. Thus, the property will not be taken from the party in possession and placed in charge of a temporary receiver during the pendency of a partition action, except upon clear and convincing proof that there is danger of irreparable loss, and that the appointment is necessary for the protection of the parties and their interests. Therefore, a temporary receiver will not be appointed if there is nothing to show that the proper and satisfactory management of the property by the tenant in common, who has been in possession for a long time, will change during the pendency of the action, or that he or she is not financially able to make good any loss in consequence of any mismanagement during that time". (14 Carmody-Wait 2d, NY Prac § 91:108, at 356.) Here, plaintiff offers no proof by clear and convincing evidence that defendant's continuation of management of the premises pending the trial would result in a loss which could be averted by granting the relief requested, as defendant is neither in possession of, nor in management of, the premises. Indeed, although it is not entirely clear, it would appear that it is the plaintiff who is in possession of or in management of the premises.

At this stage in the litigation, prior to final judgment, this court is not authorized to order the property sold. Neither is there any basis to grant a temporary receiver authority to do something which the court cannot. A temporary receiver is "merely a custodian of property and holds possession without title", and thus, cannot ordinarily sell property (91 NY Jur 2d, § 39, at 490, 508). A temporary receiver cannot be empowered to sell property to which the receiver has no title (see *Shammah v Shammah*, 2008 NY Slip Op 28479 [Sup Ct, Nassau County, 2008]) [holding that where husband could not afford to carry the house and that foreclosure might result the trial court was not permitted to order a sale of the residence in violation of the parties' agreement]).

A courtesy copy of this order is being mailed to counsel for the parties.

This constitutes the decision and order of the Court.

Dated: February 27, 2009

.....  
**Howard G. Lane, J.S.C.**