

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2020-12-03

Bushell v. Bushell

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"Bushell v. Bushell" (2020). *All Decisions*. 221.
https://ir.lawnet.fordham.edu/housing_court_all/221

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

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 5th day
of November 2020

HONORABLE FRANCOIS A. RIVERA

-----X
ANTHONY BUSHELL,

Plaintiff,

DECISION & ORDER

Index No. 525621/19

- against-

SHAWNA BUSHELL,

Defendant.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on March 16, 2020, under motion sequence number one by plaintiff Anthony Bushell for an order: (1) directing defendant Shawna Bushell to provide an accounting of the rental income and expenses for the premises 20 Pilling Street, Brooklyn, NY 11208 (hereinafter the subject property) from January 1, 2009 to the present; and (2) setting this action down for an inquest to determine the amount of use and occupancy owed to the plaintiff from the defendant as a result of defendant's use and occupancy of the property from January 1, 2016 to the present.

- Notice of Motion
- Affidavit in Support
- Memorandum of Law in Support
- Exhibits A-G
- Affirmation in Opposition
- Exhibits A-E
- Affidavit in Reply

BACKGROUND

On November 22, 2019, plaintiff commenced the instant action for, among other

things, an accounting by filing a summons and verified complaint with the Kings County Clerk's office. On January 23, 2020, the defendant joined issue by filing a verified answer.

The verified complaint alleges the following salient facts among others. In 2001 the parties were married and purchased a three (3) family residential building at 20 Pilling Street, Brooklyn, NY (hereinafter the subject property). At the time of purchase the subject property was occupied by three tenants. In 2007, the parties separated and on February 20, 2017 they divorced. The defendant moved into the subject property and continued to rent to two tenants. From 2009 to 2013, the plaintiff contributed \$500.00 monthly to the upkeep of the subject property with the defendant having sole responsibility for the collection of the rents and payment of expenses, including but not limited to the mortgage, taxes and utilities.

In 2013, the defendant ceased paying the mortgage and taxes while continuing to collect the rents from the tenants. From 2007 to the present, the defendant kept the rental income and the plaintiff's \$500.00 monthly contributions and did not pay the mortgage, taxes and other expenses. In 2011, U.S. Bank commenced a mortgage foreclosure proceeding which is still pending.

The defendant did not provide the plaintiff with part of the rental income that the defendant had been paid. The defendant has a fiduciary relationship with the plaintiff with regard to the management, ownership, and operation of the subject property. As a result of the foregoing, the plaintiff seeks one half (50%) of the rental monies received

after the payment of legitimate expenses relating to the upkeep of the subject property from 2009 to the present. Plaintiff also seeks one half (50%) of the fair market rental value of the apartment in which defendant has lived since 2009. Plaintiff also claims entitlement to the equitable relief of an accounting as to the use and occupancy from January 1, 2016 to the present.

LAW AND APPLICATION

As a threshold matter, the plaintiff did not set forth any provision of the CPLR which he was invoking for the relief he was seeking. Assuming for the sake of argument that it is a motion for an accelerated judgment pursuant to CPLR 3212, the following analysis was applied.

Claim for an accounting

The plaintiff seeks an order directing defendant Shawna Bushell to provide an accounting of the rental income and expenses for the subject property from January 1, 2009 to the present.

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (*Zohar v LaRock*, 185 AD3d 987 [2nd Dept 2020], citing *Lawrence v Kennedy*, 95 AD3d 955, 958 [2nd Dept 2012]). A plaintiff seeking an accounting has to show that he or she entrusted money or property to the defendant with respect to which he or she has an interest or which, in equity, ought to be divided (*Zohar*, 185 AD3d 987, citing *Sitar v Sitar*, 50 AD3d 667,

670 [2nd Dept 2008]).

A joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant who has received more than his own just proportion, or against his executor or administrator (RPAPL 1201; *see also Pichler v Jackson*, 157 AD3d 450 [2nd Dept 2018]).

In support of this branch of the motion plaintiff submitted, among other things, a copy of the deed to the subject property establishing that the parties owned it as husband and wife. The plaintiff also submitted a copy of the Decision and Order After Trial in his divorce action dated October 10, 2014 (hereinafter the October 2014 decision) and a copy of the parties divorce judgment dated February 22, 2017.

The October 2014 decision was issued by Special Referee Peter F. Delizzo. The decision reflected that the matter was referred to the Special Referee on February 14, 2014, by Justice Barbara Irolla Panepinto for an "inquest on grounds" and "equitable distribution". The decision also reflected that the order of referral was with the consent of the parties to hear and determine the issues pursuant to CPLR 4311.

By the October 2014 decision, Special Referee Peter F. Delizzo ordered, among other things, the following. The residential building located at 4023 Pratt Avenue, Bronx New York was to be sold. In the event that there are any residual proceeds from the sale after all liens, as well as the mortgage and taxes have been satisfied, then the parties were to share in those residual proceeds on a fifty/fifty basis. Upon the sale of this property,

the wife would be entitled to a credit of one-half of any mortgage and tax payments that she made.

By the October 2014 decision and by the divorce judgment dated February 22, 2017, the determination of the parties equitable distribution right as to the subject property had already been adjudicated. Plaintiff's rights in the subject property are limited to a fifty percent share of the residual proceeds after a sale of the subject property. It is further limited by applying a credit of one-half of any mortgage and tax payments that the defendant had made.

Plaintiff by the instant action is seeking to alter his equitable distribution rights to the subject property contrary to the October 2014 decision and the divorce judgment. It is noted that the plaintiff has not moved to appeal, modify, vacate or resettle the October 2014 decision or divorce judgment. In light of the foregoing his remedies are limited. He may not move for an accounting prior to the sale of the subject property. In accordance with the October 2014 order and divorce judgment plaintiff is entitled to an accounting after the sale of the subject property but not before. Accordingly, the plaintiff's submission raised material issues of fact regarding his right to an accounting of the income of the subject property prior to its sale. Plaintiff has failed to meet his prima facie burden and this branch of the motion is denied without regard to the sufficiency of the defendant's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]).

Claim for use and occupancy

The plaintiff also seeks an order setting this action down for an inquest to determine the amount of use and occupancy owed to the plaintiff from the defendant as a result of defendant's use and occupancy of the property from January 1, 2016 to the present. Inasmuch as the plaintiff has not prevailed on his motion for an accounting, the application for an inquest is premature. With regard to the application for use and occupancy, the following analysis would apply.

A joint tenancy, as here, is an estate held by two or more persons jointly who have equal rights to share in its enjoyment during their lives, and where each joint tenant has a right of survivorship (*Trotta v Ollivier*, 91 AD3d 8, 12 [2nd Dept 2011], citing *Goetz v Slobey*, 76 AD3d 954, 956 [2nd Dept 2010]). The right of survivorship has been defined as "a right of automatic inheritance" where, upon the death of one joint tenant, the property does not pass through the rules of intestate succession, but is automatically inherited by the remaining tenant (*Trotta*, 91 AD3d at 12, citing *United States v Craft*, 535 US 274, 280 [2002]). For one joint tenant to alienate his or her individual interest in the tenancy, the estate must first be severed or, in other words, converted into a tenancy in common with each tenant no longer possessing the entire estate, but instead, possessing an equal fractional share (*id.*).

The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant; rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of

quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties (*First Am. Title Ins. Co. v Cohen*, 163 AD3d 814 [2nd Dept 2018]).

As previously stated, the plaintiff's rights with respect to the subject property have already been adjudicated. The plaintiff has no viable claims for use and occupancy prior to the sale of the subject property. Moreover, during the plaintiff and defendant's possession of the subject property as joint tenants, they each shared equal ownership of the entire property with neither one being in a landlord tenant relationship with the other. Consequently, the plaintiff has no viable basis for use and occupancy under any circumstance.

CONCLUSION

The motion by Anthony Bushell for an order directing defendant Shawna Bushell to provide an accounting of the rental income and expenses for the subject property is denied.

The motion by Anthony Bushell for an order setting this action down for an inquest to determine the amount of use and occupancy owed to the plaintiff is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

J.S.C.