

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. JACK L. LIBERT**  
**Justice Supreme Court**

-----X  
**RAYMOND V. ALBANESE**, as fifty percent owner of property located at 60, 60(a) and 26 Saratoga Blvd., Island Park, NY 11558, County of Nassau, Town of Hempstead, section 43, Block 064, Lot #'s 103, 109, 112, 116,

**Plaintiff,**

**-against-**

**MARIA ALBANESE**, (principal defendant) as 50% owner of property located at 60, 60(a) and 26 Saratoga Blvd., Island Park, NY 11558, County of Nassau, Town of Hempstead, section 43, Block 064, Lot #'s 103, 109, 112, 116,

**-and-**

**LIMEY LUCAS INC.** (nominal defendant as tenant), **JM WIRELESS CONSTRUCTION, LLC** (nominal defendant as tenant), **TFT DIAMOND AUTO SALES, INC.** (nominal defendant as tenant) and **NEW ERA IRON WORK, CORP.** (nominal defendant as tenant),

**Defendants.**

-----X  
**The following papers having been read on this motion:**

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3,4**

Plaintiff brings this action pursuant to CPLR § 3212 requesting an Order granting summary judgment of partition pursuant to RPAPL § 901 and appointing a referee to effectuate sale of the partitioned property.

**LAW OFFICES OF  
RICHARD A FOGFL P.C.**

**APR 21 2016**

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Plaintiff Raymond V. Albanese and defendant Maria R. Albanese are siblings and sole survivors of their father Dominick A. Albanese ("Decedent"). Plaintiff moves pursuant to RPAPL 901 for sale by partition of commercial property located at 60, 60(a) and 26 Saratoga Blvd., Island Park, NY 11558, County of Nassau, Town of Hempstead, and designated on the Land and Tax map of Nassau County as Section 43, Block 064, Lot 103, 109, 112, 116 ["Property"]. The Property is improved with industrial buildings with space for several tenants. The other named parties are the current tenants at the property. The tenants were served but did not answer. The Property has been controlled since 1998 by Plaintiff and his sister, as presumptive beneficial owners of the Property.

A plaintiff establishes his or her right to summary judgment on an action for partition and sale by demonstrating ownership and right to possession of the property. (*Donlon v. Diamico*, 33 A.D.3d 841, 842; *Dalmacy v. Joseph*, 297 AD2d 329, 330 see also, *McCormick v. Pickett*, 51 AD3d 1109, 1110).

**Real Property Actions and Proceedings Law §901(1) provides:**

"A person holding and in possession of real property as joint tenant or tenant in common, in which he 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"

Decedent made a Last Will and Testament (See, *Exhibit B* to Maria Albanese Affidavit) which has not been offered for probate; nor has an administration proceeding been brought. Defendant alleges that Plaintiff lacks standing to bring a partition action because Decedent's estate is not settled and the current deed to the property is in the Decedent's name. (See, Defendant's affidavit in opposition ¶. 4-7.)

Where a will relates to real property, the probate of that will is not essential before title to the real property vests in the devisee (*St. John v. Putnam* (1927) 128 Misc. 714, 220 NYS 141). Under the law prevailing in this jurisdiction, title to real property devised under the will of a decedent vests in the beneficiary at the instant of the testator's death (*Waxson Realty Corp. v. Rothschild*, 255 NY 332; *Matter of American Museum of Natural History*, 17 Misc 2d 855, 857). Since title passes by reason of the will and not its probate (*Corley v. McElmeel*, 149 NY 228; *Bouton v. Fleharty*, 215 App Div 180, aff'd 242 NY 591), the devisee is entitled to possession

from the moment of the testator's death (*Barber v Terry*, 224 NY 334, 339; *Matter of Schroder*, 176 Misc 1024, 1027). *Matter of Estate of Payson*, 132 Misc. 2d 949, 950, 506 N.Y.S.2d 142 (Sur. 1986)

Defendant states in her affidavit that under the terms of her father's will his entire estate was left to her brother and herself (See ¶ 4, *supra*). The verified answer alleges that she and her brother own all the interest in the Property in equal fifty percent shares. (See, verified answer attached as *Exhibit B* to Plaintiff's Notice of Motion for Summary Judgment). Based upon these facts, title to the Property at issue passed "by virtue of the instrument itself [the will]". (*Corley v McElmeel*, 149 N.Y. 228, 232, 43 N.E. 628 [1896]) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy. (EPTL §6-2.2[a]). Plaintiff and defendant, beneficiaries and heirs at law hold the Property as tenants in common, each as to 50% undivided interest. Therefore, plaintiff has standing to bring this action.

In order to be entitled summary judgment, a plaintiff must demonstrate that there are no triable issues of fact through the tender of evidence in admissible form. (*Zuckerman v. City of New York*, 50 N.Y.2d 557 [1980]). In opposing the motion for summary judgment, a defendant must demonstrate an issue of fact through admissible evidence. (*Zuckerman v. City of New York, supra.*) No triable issues of fact exist in this matter. The parties are tenants in common and are deadlocked with respect to the management of the Property. Both parties wish to sell the Property but cannot agree upon a price or method of sale. Plaintiff's motion for summary judgment for partition and the appointment of a referee is **GRANTED**.

Submit order on notice. (See, CPLR 4301 and 4311).

This constitutes the decision and order of the court.

DATED: April 20, 2016

ENTER



HON. JACK L. LIBERT

J. S.C.