

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

REGTISCHLER REALTY, LLC, et al. x

INDEX NO. 20767/05

- against -

BY: KITZES, J.

DATED: February 28, 2007

WHITMAN REALTY, LLC, et al. x

This is a motion by defendants Whitman Realty, LLC, Glorshon Realty, LLC, and Jacshon Realty, LLC (defendants) for a default judgment on their counterclaim against plaintiff Regtischler Realty, LLC (Regtischler) for partition or, alternatively, for summary judgment on said counterclaim. Plaintiffs cross move (1) to vacate the default of Regtischler in replying to the counterclaim and permit service of a reply; (2) to enjoin defendants from transferring or encumbering the subject property; (3) to direct defendants to account for rents and profits from the subject property; (4) to allow the sale of the subject property; and (5) to allow Regtischler to keep all money in excess of \$9.5 million obtained from a sale.

This action arises from a dispute among the parties concerning certain real property owned by movants and Regtischler as tenants in common. A settlement agreement entered into by the parties, dated January 16, 2006, provided for, among other things, the sale of the subject property either to Yehuda Stolzberg for \$9.5 million pursuant to a contract of sale that Regtischler had

previously refused to execute, or to a third-party with whom Regtischler, within 20 days of the date of the settlement, obtained a comparable new agreement to purchase the property for not less than \$9,600,000. Stipulations discontinuing this action, including the counterclaim, were to be executed and delivered at the closing of the sale of the property to Stolzberg or a third-party purchaser procured by Regtischler. By order dated July 1, 2006, this court rejected plaintiffs' attempt to repudiate the settlement agreement and, finding that Regtischler had not established that it had received an offer to buy the premises for \$12,500,000 as claimed and had not otherwise complied with the settlement agreement's terms with regard to notifying defendants of such an offer if one did exist, directed Regtischler to perform its obligations under the settlement agreement to complete the sale to Stolzberg. The court further directed Victor Smukler, Esq., a partner of Herzfeld & Rubin, to execute the deed and transfer documents pursuant to a power of attorney granted by Regina Tischler, the owner of Regtischler, if necessary to effectuate the closing. The parties now report, however, that upon tender of the property to Stolzberg at the closing ultimately held on September 14, 2006, Stolzberg lacked the funds to close and was declared in default of the contract of sale. As such, the bases upon which the settlement herein was premised have failed; the parties' dispute and this action continue.

Although service of plaintiffs' cross motion was untimely (CPLR 2215), an adjournment on the return date provided defendants with adequate time to respond and the court will entertain the cross motion. In view of the excuse of law office failure proffered by counsel and the submission of a verified reply to the counterclaim, Regtishler's application to vacate its default in replying to the counterclaim is granted without opposition. (CPLR 5015[a][1]; 2005.) The verified reply, in the form submitted, is deemed served. (CPLR 2004.) The part of defendants' motion that is for a default judgment is, therefore, denied and the court will consider the alternative relief of summary judgment. (CPLR 3212, 3215.) To the extent the notice of cross motion contains a request to enjoin defendants from transferring or encumbering the subject property, it is noted that no such relief is discussed in the supporting papers and, under the parties' present postures, such request is meaningless. It appears plaintiffs have mistakenly repeated a request for relief made in a prior motion that was denied by order dated July 19, 2006.

A person holding an interest in, and in possession of, real property as a tenant in common may maintain an action for partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners. (RPAPL 901[1]; see Donlon v Diamico, 33 AD3d 841 [2006]; Piccirillo v Friedman, 244 AD2d 469 [1997]). Movants have made a prima facie showing that they own the subject property as tenants in common

with Regtischler. Plaintiff Regtischler has failed to raise an issue of fact regarding the existence of the tenancy in common and the respective ownership interests of the parties in the subject property. To the contrary, in both the verified complaint and verified amended complaint plaintiffs alleged the same ownership interests as those asserted by movants. Nor has Regtischler shown the existence of a viable agreement among the parties to forego partition. Regtishler's right under the settlement agreement to negotiate a new agreement for the sale of the property, and the corresponding right to the sales proceeds in excess of \$9.5 million, extended only for 20 days from the date of the settlement agreement and cannot be exercised now. Furthermore, the redacted, or incomplete, unsigned letters and documents that fail to identify the purported potential buyer for the subject property are insufficient to weight the equities against partition. (See, Donlon v Diamico, supra.)

Nonetheless, defendants are not entitled to an interlocutory judgment directing a sale of the property at this juncture. (RPAPL 915.) Defendants have failed to submit evidence sufficient to establish, prima facie, that the subject property is so circumstanced that partition thereof cannot be made without great prejudice to the owners. (RPAPL 901[1]; Wolfe v Wolfe, 187 AD2d 628 [1992]; Grossman v Baker, 182 AD2d 1119 [1992]; cf., Donlon v Diamico, supra.) Furthermore, an accounting is a necessary incident of a partition and must be conducted prior to

entry of an interlocutory judgment to ensure that the parties' rights are fixed in such manner that a decree works full and complete justice between them. (See, Wolfe v Wolfe, supra; Grossman v Baker, supra.) An accounting must be made herein of the income and expenses of the property, including but not limited to insurance costs, taxes, rents and maintenance costs. (See, Donlon v Diamico, supra.)

Accordingly, the motion is granted to the extent that it is determined that defendants own and are in possession of the subject property, together with plaintiff Regtischler, as tenants in common. (RPAPL 901[1].) A referee shall be named in the order to be settled hereon to ascertain and report on the rights, shares and interests of the parties in the premises, as well as on whether the property is so circumstanced as to require a sale and whether there are any creditors with liens upon the undivided share or interest of any party, and to take an account of the rents, profits and expenses of the property. The cross motion is granted only to the extent indicated therein. In all other respects, the cross motion is denied.

Settle order.

J.S.C.