Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

ARTHUR MAYER, Plaintiff, -against- JERROLD MAYER, et al., Defendants.	Index Number 1977 2005 Motion Date October 26, 2005 Motion Cal. Number 18

The following papers numbered 1 to 10 were read on this motion by the defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment on their counterclaim seeking a declaratory judgment; and, cross motion by the plaintiff, pursuant to CPLR 3025, for leave to amend the complaint to interpose a cause of action based upon RPAPL article 16 and for a trial preference and expedited discovery.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Reply Affidavits	9-10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

A. Background Regarding Properties and Ownership

By deed dated April 27, 1973, the plaintiff Arthur Mayer (Mayer) and his wife Thelma became owners of a property located at 62-11 Dieterle Crescent, Rego Park, New York (Crescent property) as tenants by the entirety.

Following Thelma's death, by deed dated January 21, 1988, Mayer as surviving tenant by the entirety conveyed the Crescent

property to his son Jerrold Mayer (son) and his daughter Barbara Pashkoff (daughter) (collectively, children), as joint tenants with right of survivorship and not as tenants in common; however, that deed specifically reserved and excepted unto Mayer, "the full use, control, income and possession of the property for and during his natural life."

In 1989, Mayer became ill with Hodgkin's disease and could no longer maintain the Crescent property which had been the family home. In December 1989, the Crescent property was sold for $425,000.00, and a condominium property known as The Bay Club, 1 Bay Club Drive, Unit 20N in Bayside, New York (Bay Club unit) was purchased.

Pursuant to a deed dated December 11, 1989 and a rider dated December 16, 1989, title to the Bay Club unit was held by the son and daughter as tenants in common; however, the rider specifically reserved and excepted for Mayer the "full use, control, income and possession of the said premises for and during his natural life."[1]

Mayer continues to suffer from Hodgkin's disease. On July 22, 1993, he entered into a prenuptial agreement with Leny Tabugoca (Tabugoca), wherein he warranted and acknowledged, inter alia, that the Bay Club unit in which he resided was the sole property of the children, that he was a life tenant thereof, that his interest would terminate upon his death, and the property would be disposed of in accordance with the terms and conditions made at the time of its purchase. In the same agreement Mayer and Tabugoca released one another as surviving spouse, from all claims in law or equity to equitable distribution, distributive awards or the separate property of the other, and waived any statutory rights or interest they might have in the real property, personal property or the estate of the other.

Mayer married Tabugoca in 1993. He is now 87 years old and he and Tabugoca have a three-year old child. He indicates that his

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[1] Pursuant to a separate agreement dated December 19, 1989, the children agreed among themselves that: (1) they were granting a life estate to Mayer; (2) upon the death of Mayer, the Bay Club unit would be sold with the sales price being determined by an agreement or by formula; (3) upon such sale, the sum of $23,536.00 would be reimbursed to the daughter for the amount paid by her toward the purchase of the unit; and, (4) after the payment of taxes and other expenses and reimbursement of the daughter, the children would divide the proceeds equally.

wife is now disabled, he continues to be treated for Hodgkin's disease, and he has little means of support.

In his original complaint filed on January 26, 2005, Mayer interposed one cause of action alleging that title to the Bay Club unit was mistakenly placed solely in the names of his children as an accommodation to his estate plan, and title should have been placed in his name. As a result, that cause of action seeks a determination of the parties' rights, and a declaration that he is the lawful owner of the Bay Club unit. In response to that complaint, the children interposed the affirmative defenses of the statute of limitations and the statute of frauds, and counterclaimed for a declaration that they are the owners as tenants in common of the Bay Club unit and that Mayer has a life estate therein.

II. Motion and Cross Motion

The children move for summary judgment dismissing the complaint and for a declaratory judgment on their counterclaim, asserting that: (1) Mayer's claim of "mistake" lacks merit, as the proceeds from the sale of the Crescent property were divided between the children who purchased the Bay Club unit; (2) any claim of mistake occurred prior to the delivery of the deed to the Bay Club unit in December 1989, and this action is barred by the statute of limitations; (3) upon the purchase of the Bay Club unit Mayer received only a life estate, and in the prenuptial agreement he acknowledged that the children owned the Bay Club unit; and, (4) Mayer has moved out of the Bay Club unit, and he commenced this action solely to obtain money, despite the fact that he has only a life tenancy.[2]

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[2] In support the children annex, inter alia: (1) an undated Unified Closing Statement relating to the sale of the Crescent property indicating, inter alia, that Mayer received $136,064.00 which was used to purchase the Bay Club unit, that his daughter received the same amount but used $23,536.00 to purchase the Bay Club unit, and his son received $136,064.00; (2) a closing statement for the Crescent property, dated December 19, 1989 indicating, inter alia, that following the payment of expenses and attorney's fees, the sum of $265,400.00 was deposited in escrow and, from that amount, $136,064.00 was disbursed to the son, $112,528.00 was disbursed to the daughter, and $7,400 was disbursed to Mayer.

Mayer opposes the motion and cross-moves for leave to amend the complaint to interpose a second cause of action pursuant to RPAPL article 16, and for expedited discovery and a trial preference. In support, he contends that: (1) upon the sale of the Crescent property, he and each of his children received $136,064.00, and he paid $144,000.00 toward the purchase of the Bay Club unit; (2) his daughter paid $23,000.00 out of the proceeds of the sale of the Crescent property toward the purchase of the Bay Club unit, and his son paid nothing; (3) he thought he had a one-third interest in the Bay Club unit plus a life estate; and, (4) his life estate has a present value which can easily be calculated, and the market value of the Bay Club unit is $500,000.00.[3]

III. Decision

Leave to amend a pleading should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice or surprise directly results from delay in seeking such amendment (see Burack v Burack, 122 AD2d 101 [1986]; CPLR 3025). Here, the proposed second cause of action is based upon the same facts alleged in the original complaint and, thus, its interposition would not surprise or prejudice the children.

With respect to the merits of the allegations of the second cause of action, RPAPL 1602 provides that when the ownership of real property is divided "into one or more possessory interests and one or more future interests," the owner of any interest in such real property or in the proceeds to be derived therefrom on a directed sale thereof, except the owner of a possessory estate in fee simple absolute therein, may apply to the court for an order directing that said real property, or a part thereof, be mortgaged, leased or sold (see RPAPL 1602; see also RPAPL 1603, 1604).

Generally, while land owners have the right to convey whatever interests they hold in the property even though the date of full possession and enjoyment is not due, a life estate conveys exclusive ownership of the land during the lifetime of the life tenant, subject only to certain well-defined limitations or duties (see Matter of Gaffers, 254 App Div 448 [1938]; Matter of Strohe, 5 Misc 3d 1028A [2004]; Thorn v Stephens, 169 Misc 2d 832, 833 [1995]; see also Matter of Sauer, 194 Misc 2d 634 [2002];

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[3] In support Mayer relies on, inter alia, the same Unified Closing Statement submitted by the children.

8-86 Warren's Weed New York Real Property, § 86.01; cf. Bartholomew v Horan, 37 AD2d 643 [1971]). Distinguishable from a mere right to occupy a property, which is a personal privilege only and not an interest or estate in the property (see Matter of Strohe, 5 Misc 2d at 1028A; Matter of Sauer, 194 Misc 2d at 635-636), it is well-settled law that a life estate is more than occupancy, as "[a] life tenant is tantamount to the owner of the property and is entitled to all of the benefits and burden of such ownership although not a fee ownership, so long as the remainder interest is not affected (Matter of Fisher, 169 Misc 2d 412, 413 [1996]; see, Matter of Gaffers, 254 App Div 448 [1938]; Thorn v. Stephens, 169 Misc 2d 832 [1995])." Matter of Strohe, 5 Misc 3d 1028A [2004].

Thus, the holder of a life estate may, under certain circumstances, be able to force the sale of real property and collect the value of his life estate, assuming that he can demonstrate that the proposed sale is expedient (see Matter of Gaffers, 254 App Div at 448; Matter of Strohe, 5 Misc 3d at 1028A; Matter of Sauer, 194 Misc 2d at 634; RPAPL 1604). Moreover, a life estate has a determinable value (see Wood v Powell, 3 App Div 318 [1896]; Matter of Strohe, 5 Misc 3d at 1028A; Matter of Sauer, 194 Misc 2d at 634; Matter of Fisher, 169 Misc 2d 412 [1996]; see also Thorn, 169 Misc 2d at 836 n 5 [price of property sold subject to life estate reduced by $500,000]; RPAPL 401 et seq. 967, 968).

In this case, Mayer has a life estate in the Bay Club unit (see Matter of Strohe, supra; Matter of Sauer, supra; Thorn, supra; 8-86 Warren's Weed New York Real Property, supra). Although the children contend that this does not entitle Mayer to a sale of the premises or to any proceeds thereof because they hold title as tenants in common, their argument reflects a misunderstanding of the difference between a life estate and mere right to occupy property. See, Matter of Strohe, 5 Misc 3d 1028A [2004]. Thus, the second cause of action is not palpably insufficient as a matter of law (see RPAPL 1602, 1603). Accordingly, that branch of Mayer's motion seeking leave to serve and file the amended complaint/petition interposing the second cause of action is granted, and the amended complaint/petition annexed to Mayer's cross motion is deemed served on the children.

With respect to the first cause of action seeking, in essence, reformation of the deed to the Bay Club unit on the ground of mistake, the deed and rider for the Bay Club unit were executed on December 16, 1989, and Mayer executed a prenuptial agreement in July 1993, acknowledging the childrens' interests in that property. As the original complaint interposing the first cause of action was filed on January 26, 2005, that cause of action is barred by the

statute of limitations as it was asserted more than six years after accrual (see CPLR 213) and more than two years after discovery (see CPLR 203[f]; see also Wilshire Credit Corp. v Ghostlaw, 300 AD2d 971 [2002]; Amalgamated Dwellings, Inc. v Hillman Hous. Corp., 299 AD2d 199 [2002]; Green Point Sav. Bank v Dan's Supreme Supermarket, Inc., 199 AD2d 304 [1993], appeal dismissed in part, lv denied in part 84 NY2d 882 [1994]; Warwick Materials, Inc. v J.K. Produce Farms, Inc., 111 AD2d 805 [1985]).

Therefore, that branch of the motion by the children seeking summary judgment dismissing the first cause of action is granted, and the first cause of action interposed in the amended complaint is dismissed. The branch of the childrens' motion seeking summary judgment on their counterclaim for a declaration that they be constituted the owners as tenants in common of the Bay Club unit and that Mayer holds a life estate in that property is granted, and the issuance of the declaration and declaratory judgment shall be held in abeyance pending the determination of the second cause of action (see CPLR 3212[e][2]).

The children are directed to file an answer to the second cause of action interposed in the amended complaint within thirty (30) days of service upon them of a copy of this order with notice of entry. That branch of Mayer's cross motion seeking a trial preference and expedited discovery is granted. All parties are directed to appear for a preliminary conference at the Preliminary Conference Part on Tuesday, February 21, 2006 at 11:30 a.m.

Dated: December 13, 2005

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J.S.C.