

Laney v Siewert

2005 NY Slip Op 30398(U)

February 7, 2005

Supreme Court, New York County

Docket Number: 603211/03

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Kornreich, Shirley Werner, J.**
Justice

PART 54

Scott M. Laney

Plaintiff

-against-

James N. Siewert, Broadway Eleven Owners, Inc.,
and Key Bank,

Defendants.

INDEX NO. 603211/03

MOTION DATE 10/14/04

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

The following papers, numbered 1 to 2, were read on this motion for

Compel Disclosure

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits

2

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

FILED

FEB 17 2005

NEW YORK
COUNTY CLERK'S OFFICE

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Dated: February 7, 2005

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SCOT M.. LANEY,

Plaintiff,

Index No.: 603211/03

**DECISION and
ORDER**

-against-

JAMES N. SIEWERT, BROADWAY ELEVEN
OWNERS, INC. AND KEY BANK,

Defendants,

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action for partition of the cooperative apartment located at 808 Broadway, Apartment 5-K, in New York City (the "Apartment"). Plaintiff Scot M. Laney and defendant James N. Siewert lived together in the Apartment from 1983 to 1997. Laney's and Siewert's names appear on the stock certificate for the Apartment; Laney and Siewert are co-signatories to the lease and at least one mortgage on the Apartment.¹ Mr. Laney alleges that in 1997, Mr. Siewert commenced a "sexual affair" with the doorman of the building, causing Laney great distress, thus ousting him from the Apartment. Affidavit of S. Laney, ¶ 20. Mr. Laney now seeks partition on the ground that he and Siewert are co-owners "as 50/50 tenants in common" of the Apartment.

In his answer, Siewert admits that he and Laney lived together in the apartment from

¹As discussed, *infra*, there is a question as to whether Laney and Siewert are co-obligors on a second mortgage. Laney alleges that Siewert "falsely signed the name of Plaintiff to refinancing papers in September 2001."

1985 to 1997, that they are co-tenants on the lease and co-obligors on the mortgage, but denies that they are co-owners of the shares, and denies that he fraudulently signed plaintiff's name to any refinancing documents. Siewert asserts that Laney's name was added to the co-op shares only as a "convenience," that Laney made only a de minimus contribution toward the purchase, that he has never paid any rent or maintenance, has made minimal utility payments, and was never intended to be an equal tenant in common. By way of counterclaim, Siewert seeks an order striking plaintiff's name from the stock certificate and lease.

In Motion Sequence #1, Mr. Laney moves to compel disclosure from Mr. Siewert. In Motion Sequence #2, Siewert moves for summary judgment dismissing the action as against him, and co-defendant Key Bank cross-moves for dismissal as against it. The Court will consolidate both sequences for unitary disposition.

Motion to Compel

After noticing Mr. Siewert's deposition for January 13, 2004,² Mr. Laney served Siewert with a demand for disclosure dated January 16, 2004. Dissatisfied with Siewert's response to the demand, plaintiff now moves to compel disclosure from Siewert. To the extent relevant here, Laney's demand sought disclosure of:

3. All documents relied upon in preparing the Answer with Counterclaims, including but not limited to any financial documents used to prepare Counterclaims ¶¶ 13-14; the titling allegations of ¶ 15; and the allegations contained within ¶ 19 regarding repairs/improvements to the premise [sic].
4. All legal fee invoices and retainer agreements forming the basis of the allegations contained within Counterclaim ¶ 22.
5. All communications between Plaintiff and Defendant.

²Plaintiff's deposition was taken on January 27, 2004, but Siewert's has yet to occur. Siewert served a notice to produce and demand for bill of particulars on March 29, 2004.

6. All communications between Defendant and any third parties concerning Plaintiff...
9. All documents Defendant intends to rely upon at trial.

By letter dated May 5, 2004, Siewert's attorney objected (and now objects) to the foregoing demands on the grounds that they are either overbroad or seek privileged material. DeLaurentis Aff., Ex. D. The Court concludes that all of the foregoing demands are overbroad with the exception of the fourth. As to the fourth demand, its relevance derives from the fact that Siewert's fourth counterclaim seeks "damages in the form of sanctions against the Plaintiff for the necessity of defending against Plaintiff's cause of action based on fraud... ." Therefore, plaintiff is entitled to continuing disclosure of any fee invoices and retainer agreements for legal services in connection with Siewert's defense of this action.

Summary Judgment Motions

Mr. Siewert moves for summary judgment dismissing the action against him, and an order directing that Mr. Laney's name be stricken from the stock certificate and lease. In support of his motion, Siewert submits his affidavit and that of his attorney, together with documentary evidence. Opposing the motion, Laney submits his affidavit and documentary evidence. Defendant Key Bank cross-moves for summary judgment dismissing the complaint as against it and submits the affidavit Robert Schmit, Jr., a banking officer of Key Bank. For the reasons set forth below, the Court denies both motions.

Facts

Mr. Siewert avers that he has resided in the Apartment since March 7, 1983, first pursuant to a lease dated March 7, 1983 and then as owner of the shares appurtenant to the Apartment, which he purchased on January 16, 1985 under an "Option to Purchase" provision under the

lease. Affidavit of J. Siewert, ¶¶ 2-5. The purchase price was \$135,150.00, for which Siewert and Laney took out a mortgage in the amount of \$80,000. The total closing cost was \$145,622.13, of which \$5,270 was paid by Mr. Laney. Id., ¶ 14. According to Siewert, when he purchased the shares, he “agreed to place Plaintiff Scot M. Laney’s name on the Stock Certificate and Proprietary Lease as a convenience, without ever intending to create an undivided one-half interest in the premises.” Id., ¶ 8. Mr. Siewert further avers that Laney’s only contributions toward the Apartment over the period of over twenty years during which he cohabited there with Siewert were a one-time payment of \$5,000 which was placed in escrow and credited toward the purchase of the Apartment, and a “miscellaneous fee” of \$270. Id., ¶ 10. Attached to Siewert’s affidavit are charts detailing Siewert’s expenses for maintenance, repairs and personal loans allegedly made to Mr. Laney since 1985.

Mr. Laney avers that he and Siewert “cohabited as domestic partners” for 15 years from 1982 to 1997 in Philadelphia and New York. Plaintiff describes their relationship as follows:

During the entire course of the relationship, we shared as all couples do the responsibilities concerning cleaning, maintenance, paying bills, cooking and other domestic matters. With regard to financial matters, we each contributed to our ability. My financial ability was less than Defendant Siewert’s ... because we were 9 years apart in age and consequently, his career and income were more advanced than mine. .. After we cohabited [sic] together for two years from 1982-1984, we jointly decided to purchase the apartment we were living in at 808 Broadway... We both contributed the funds we had available to us at the January 1985 closing. I contributed 43% of the cash necessary to close the transaction , and obligated myself 100% on the loan obtained to complete the purchase of the cooperative.

Affidavit of S. Laney in Opposition to Summary Judgment, ¶¶ 3-9.

Laney further avers that Siewert would not have been able to purchase the Apartment

without his cash contribution, and disputes Siewert's claim that he loaned plaintiff any money during the course of their relationship. Laney Aff., ¶ 23. Instead, plaintiff characterizes Siewert's alleged loans to him as "gift[s] and/or for our mutual benefit," such as "travel/vacation items" and claimed improvements to the Apartment. Id. Plaintiff states that after he discovered Siewert's affair with the doorman, he was "effectively ousted from the premises" because he "could not bear to have to walk past the doorman who had ruined [his] relationship several times a day, nor could [he] endure living in the same apartment as Defendant Siewert." Id., ¶ 21. Finally, plaintiff attaches to the affidavit a copy of his credit report as evidence of his "belief that Defendant Siewert caused a 2001 home equity loan to be taken on the cooperative without [his] knowledge or approval.

Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. Zuckerman v. City of N.Y., 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. See In re Dissolution of Rencor Controls, Inc., 263 A.D.2d 845 (3rd Dept. 1999) (citing Hanson v. Ontario Milk Producers Coop., Inc., 58 Misc.2d 138 (Sup.Ct. Oswego County 1968) (Aronson, J.)). The Court concludes that neither Siewert nor Key Bank have made out a prima facie case of entitlement to summary judgment.

While shares in a co-operative apartment are considered personal, not real property, they may be the subject of a partition action. See Chiang v. Chang, 137 A.D.2d 371, 374 (1st Dept.

1988). Where more than one name appears on the stock certificate for a co-operative apartment, and the certificate does not indicate the form of ownership, there is a presumption that the persons whose names appear on the certificate hold the shares as tenants in common. See Estate of Menon v. Menon, 303 A.D.2d 622 (2nd Dept. 2003); Rettig v. Holler, 2003 N.Y. Misc. LEXIS 1599 (Sup. Ct., New York County, Beeler, J.). Here, the plaintiff's name appears on the stock certificates along with Siewert's, with no indication of the form of ownership. Siewert has failed to submit any evidence defeating the presumption that he and plaintiff took ownership as tenants in common. Siewert's principal argument is that he paid the majority of the purchase price and the expenses for mortgage and maintenance. At most, this argument only raises an issue of fact as to whether, in the context of the parties' long-term relationship, any disparity in financial contribution was intended as a gift from Siewert to plaintiff. See Rettig, supra (where person whose name appears on stock certificate for cooperative apartment did not contribute financially to purchase of shares, question of fact is raised as to whether inter-vivos gift was intended). Id. Similarly, Siewert submits no evidence disproving plaintiff's allegations of fraud or ouster; he merely argues that plaintiff has no evidence to support these claims. However, it is Siewert who bears the burden of proof here, as he has moved for summary judgment. Moreover, the Court notes that Siewert has moved for summary judgment before his deposition has been taken, thus preventing plaintiff from obtaining testimony potentially supporting his claims. Therefore, Siewert has failed to meet his burden, and his motion must be denied.

As to Key Bank's cross-motion, it appears that Key Bank has not answered the

complaint.³ See Plaintiff's Memorandum of Law in Opposition to Key Bank's Cross Motion for Summary Judgment. Therefore, Key Bank's summary judgment motion is improper and must be denied as such. See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:12 at 21. However, as no party moves for default judgment against Key Bank, the Court will consider Key Bank's cross-motion as a motion to dismiss under CPLR 3211. See id. The Court's task in a CPLR 3211 motion is "to determine whether plaintiff's pleadings state a cause of action." See 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Id. (citations omitted). The Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Dismissal under CPLR 3211 (a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002) (citations omitted).

Here, plaintiff's complaint alleges that Mr. Siewert fraudulently secured a second mortgage on the Property from Key Bank by falsely signing plaintiff's name to refinancing papers in September 2001. Assuming the truth of this allegation, the Court cannot dismiss the cause of action against Key Bank. While allegations of fraud require particularity of pleading under CPLR 3016(b), plaintiff has not been deposed and Key Bank has not even appeared until this cross-

³There is no mention in the parties' submissions as to whether defendant Broadway Eleven Owners, Inc. has answered or appeared

motion. Under the circumstances, plaintiff's pleading is sufficiently specific. Moreover, plaintiff backs up his allegation with a copy of his credit report showing him as a debtor under a loan made by Key Bank in September of 2001. Key Bank's affidavit stating that Key Bank "made no loan to [Siewert] or to Plaintiff at any time, and refinanced no such loan," merely creates a triable issue of fact. Accordingly, it is

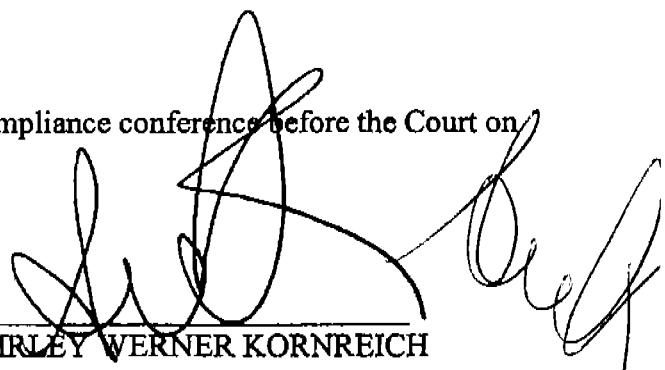
ORDERED that defendant James N. Siewert shall produce all legal fee invoices and retainer agreements for legal services thus far provided to Mr. Siewert for his defense in this action within 20 days, and any such invoices or retainer agreements as may exist in the future; and it is further

ORDERED that the motion of defendant James N. Siewert for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross-motion of defendant Key Bank for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a compliance conference before the Court on February 24, 2005, at 9:30 a.m.

Date: February 7, 2005
New York, New York


SHIRLEY WERNER KORNREICH

SHIRLEY WERNER KORNREICH
J.S.C.

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