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

PRESENT: _____ PART 30

Index Number : 111063/2005
SANKO, ANTON
VS
MARK,IRA
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. 111063/05
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 3.23.07.

Dated: 3.23.07

SHERRY KLEIN HEITLER
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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ANTON SANKO,

Plaintiff,

-against-

IRA MARK, MARK FAMILY REALTY LLC, SELROB FAMILY LIMITED PARTNERSHIP, SELINA HENRY, ROBERT HENRY, TEMILY MARK-WIENER, GILLIAN CINTOLI, JANE BAMBERG and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

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Index No. 111063/05

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this action for partition of property owned by the parties as tenants-in-common, the parties move as follows: (1) plaintiff Anton Sanko moves for an order directing the release of certain monies, currently being held in escrow, to himself, defendant Mark Family Realty, LLC (Mark Family), and defendant Selrob Family Limited Partnership, while defendants Ira Mark (Mark) and Mark Family (together, Mark defendants) cross-moves for an order directing plaintiff to pay maintenance costs for the subject real property to itself and defendant Selrob Family Limited Partnership (Selrob), in equal shares, and for costs and reasonable attorney's fees (mot. seq. no. 003); and (2) plaintiff moves for summary judgment (mot. seq. no. 004). The motions are consolidated for determination.

I. Background

This action involves real property located at 801 and 803 Greenwich Street (the premises), in which plaintiff owns a one-

third undivided interest as a tenant-in-common. The Mark defendants own another one-third divided interest, while the third one-third interest is owned by defendants Selrob Family Limited Partnership, Selina Henry and Robert Henry (together, Selrob defendants). The relationship among the parties was governed by three separate agreements, as described more fully in a prior decision of this court.

Before the advent of the present dispute, plaintiff and the Mark and Selrob defendants rented a portion of the premises to one Maggie Gyllenhaal (Gyllenhaal), as her residence. Plaintiff signed a renewal lease with Gyllenhaal, for a term running from January 1, 2006 to December 31, 2006. The Mark and Selrob family defendants objected to the renewal. As a result, the Mark family defendants brought a holdover proceeding against Gyllenhaal in Civil Court (the Civil Court action), on the ground that plaintiff had no right under the parties' agreements to renew Gyllenhaal's lease. The petition was denied, in a decision dated September 23, 2006, upon a finding that Gyllenhaal's renewal lease was valid.

Following the dismissal of the Civil Court action, plaintiff commenced the present action for partition. In this action, this court signed a decision and order dated September 20, 2006, directing plaintiff to turn over all rents received from Gyllenhaal, for the period January 1, 2006 to December 31, 2006, and thereafter, to the Selrob defendants' attorney, Jon Quint, Esq. of Mound Cotten Wollen & Greengrass, to be held by him in escrow.

Prior to the present motion, plaintiff moved for the appointment of a receiver for the premises. The Mark family defendants and Selrob defendants cross-moved for summary judgment. Both motions were denied. In a decision dated September 5, 2006 (Decision), the court denied summary judgment to the cross movants, upon a finding that the agreements between the parties did not bar an action for partition.

Plaintiff moves for an order directing the release of the rent monies from escrow, to be paid in equal shares to himself, defendant Mark family Realty LLC and defendant Selrob Family Limited Partnership. Plaintiff also seeks an accounting appurtenant to the partition or sale of the premises, complaining that Mark, who actually manages the premises, has withheld an accounting for years, thereby standing in the way of plaintiff's attempt to ascertain how much money is due to each party, based on their common ownership of the premises.

II. Discussion

(A) Plaintiff's Motion for Summary Judgment

The proponent of a summary judgment motion must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact." *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35 (1st Dept 2004); *see Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Upon submission of such evidence, "the burden shifts

to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1st Dept 2004); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Plaintiff bases his motion for summary judgment on the Decision denying the Mark and Selrob defendants' cross motion for summary judgment. Plaintiff maintains that, in denying the cross motion, this court effectively dismissed the Mark and Selrob defendants' only valid affirmative defense, leaving them open to summary judgment in plaintiff's favor. The Mark and Selrob defendants' opposition is based on the argument that the Decision was erroneously decided, and that, as a result, the motion is premature, in that the Mark and Selrob defendants need extra discovery to flesh out a defense this court has already found they don't have.[1]

Plaintiff's motion for summary judgment is granted. In the Decision, this court found that paragraph 8 of the 1992 agreement between the parties, allocating to each the parts of the premises which they would occupy, and containing a right of first refusal with regard to the sale of any tenant's interest, was rendered void

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[1] The cross-movant defendants also complain that the motion for summary judgment is improperly brought, because plaintiff has failed to attach the pleadings to his motion, as required by CPLR 3212 (b). However, the lack of pleadings has been nullified, as they are attached to the papers in the accompanying motion. Although plaintiff did fail to satisfy CPLR 3212 (b), the court will not, under the circumstances, delay determination of this motion.

under EPTL § 9-1.1 (b), and applicable case law. As a result, the present action for partition was not barred by the parties' agreements.

The defendants apparently have no further defense to the action for partition. In their present papers, they merely call into question the validity of this court's reasoning, and conclude that the court made a mistake. However, defendants did not bring a motion for reargument; it would be time-barred if they did; and the Mark defendants would be denied such relief in any event, due to the fact that they merely repeat and enlarge on arguments already made, or which could have been made. See CPLR 2221 (a). They have failed to raise a single other substantive defense to plaintiff's motion.[2]

"A person holding and in possession of real property as joint tenant or tenant in common ... may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners." Real Property Actions and Proceedings (RPAPL) § 901 (1); *see Donlon v Diamico*, 33 AD3d 841 (2d Dept 2006); *Gabay v Bender*, 24 AD3d 133 (1st Dept 2005). In this case, there is no question of fact regarding plaintiff's right to possess the property, "which is all that [is] needed to maintain the present partition action." *Donlon*

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[2] Defendants' do suggest that this court's denial of their motion for summary judgment was effectively a denial of summary judgment to plaintiff, even though plaintiff had not moved for summary judgment. It was not.

v Diamico, 33 AD3d at 842; *see also Dalmacy v Joseph*, 297 AD2d 329 (2d Dept 2002). Defendants argue that plaintiff has failed to make a prima facie case for summary judgment by failing to supply proof of an ownership interest in the premises. There has already been a decision, based on a record apparently satisfactory to all parties, in which plaintiff's ownership was accepted as a fact. Further, defendants do not suggest that plaintiff does not have an ownership interest; they know he does.

Plaintiff is also permitted an accounting. In the present case, plaintiff, in seeking an accounting, accuses Mark of mismanagement of the building. "Although a partition action is statutory (RPAPL art 9), it is equitable in nature and, therefore, an accounting is a necessary incident thereof." *Deitz v Deitz*, 245 AD2d 638, 639 (3d Dept 1997). Therefore, because Mark does not deny that he manages the premises, and because he has not yet accounted to plaintiff for his management, an accounting is necessary as part of the partition of the premises.

B. Motion to Release Escrow

This court ordered that the Gyllenhaal rents be placed in escrow prior to the completion of the Civil Court proceeding. That proceeding was completed on September 23, 2006, with a finding that Gyllenhaal's renewal lease was valid. Therefore, the matter necessitating the escrow no longer exists, and so, plaintiff's motion to release the monies, and to distribute them equally among himself, the Mark Family and Selrob, is granted.

C. Cross Motion Directing the Plaintiff to Pay Maintenance

The Mark defendants claim that plaintiff owes the Mark and Selrob defendants $52,000 for costs incurred in maintaining the premises. In support of this claim, the Mark defendants produce a "ledger" and, in their reply papers, produce a small stack of undifferentiated invoices, bills and checks, as evidence that bills are "mounting on a daily basis." Roth Reply Mem., at 2.

This court finds that the bare ledger, without any documentary underpinnings, fails to prove that plaintiff owes any maintenance for the building, requiring the denial of the cross motion. However, the question of any past expenses for the maintenance of the premises should be addressed in the accounting which will accompany partition. Therefore, if plaintiff owes any maintenance costs, they will be charged to his share of the partition proceeds.

Attorney's fees would not be available to cross movants even had they prevailed. "The American Rule provides that 'attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule.'" *Baker v Health Management Systems, Inc.*, 98 NY2d 80, 88 (2002), quoting *Hooper Associates, Ltd. v AGS Computers, Inc.* 74 NY2d 487, 491 (1989).

Accordingly, the motions are determined as follows: plaintiff's motion for release of the escrow monies held by Jon Quint, Esq. of Mound Cotten Wollen & Greengrass is granted (mot. seq. no. 003); defendants Ira Mark and Mark Family Realty LLC's

cross motion is denied; and plaintiff's motion for partition, with an accounting, is granted.

Settle order.

DATED: MARCH 23 , 2007

SHERRY KLEIN HEITLER
J.S.C.