

Kahn v Levy

2007 NY Slip Op 31709(U)

June 14, 2007

Supreme Court, Greene County

Docket Number: 0020073/2710

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

MITCHELL KAHN and SHERRIE C. KAHN,

Plaintiffs,

DECISION and ORDER
INDEX NO. 07-327
RJI NO. 19-07-2960

-against-

DAVIS H. LEVY and YAEL EDELIST

Defendants.

Supreme Court Albany County All Purposes Term, May 15, 2006
Reassigned to Justice Joseph C. Teresi

APPEARANCES:

James F. Keefe, Esq.
Attorney for Plaintiffs
527 Main Street
Cairo, New York 12413

Joseph H. Warren, Esq.
Attorney for Defendants
46 Reed Street
Coxsackie, New York 12051

TERESI, J.:

The plaintiffs moves for summary judgment pursuant to CPLR 3212 and seek to partition real property owned by the parties on Sleepy Hollow Lake, Greene County, New York. The plaintiffs also seeks the appointment of a Referee to determine the rights of the parties and to proceed with the partition sale. The defendants oppose the motion and allege questions of fact exist that precludes summary judgment.

On June 21, 2001, the parties purchased real property containing a single dwelling and each couple has a one-half interest in the realty. The property is encumbered by a mortgage. The parties have had irreconcilable differences pertaining to the use of the property. The plaintiffs wish to have the defendants buy them out or sell the property to others. The plaintiffs allege the parties cannot agree on the value of the property. The plaintiffs contend that since the property is encumbered with a mortgage on a residential lot, partition cannot be achieved without great prejudice.

The defendants contend the plaintiffs have been unreasonable in their negotiations and they have placed a high value on the property. The defendants allege the plaintiffs believe the property is worth \$425,000.00 to \$475,000.00. The defendants claim they had the property professionally appraised in April 2006 and the property appraised at \$285,000.00. The defendants claim the value of the property has declined ten per cent since April 2006. The defendants attempted to rent the property to defray the costs of maintaining the house but the plaintiffs have refused to rent the house. The defendants allege the plaintiffs have refused their offers to purchase plaintiffs' one-half interest in the home.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be

viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v City of New York, *supra*, 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3rd Dept. 2001). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

Partition among tenants in common of real property is a matter of right where the tenants no longer desire to hold property in common. See, RPAPL § 901; Rosen v. Rosen, 78 AD2d 911 (3rd Dept. 1980). It is well settled that a tenant-in-common of real property may maintain an action for the partition and for the sale of the property, if it appears that partition alone cannot be made without great prejudice to the owners. See, Wilbur v. Wilbur, 266 AD2d 535 (2nd Dept. 1999).

The parties cannot agree on the value of the home. The plaintiffs wish to sell the house if the defendants are unable to purchase their one-half share. The plaintiffs have established their entitlement to summary judgment directing that the real property be partitioned and sold at public auction by demonstrating that the subject property “was so circumstanced that partition [alone] thereof cannot be made without great prejudice to the owners.” See, Donlon v. Diamico, 33 AD3d 841 (2nd Dept. 2006). The defendants failed to demonstrate the existence of a triable issue

of fact sufficient to defeat plaintiffs' motion. See, Russo Realty Corp. v. Katz, 211 AD2d 673 (2nd Dept. 1995).

Plaintiffs' motion for summary judgment is granted. Eugenia Brennan Esq
of Box 155 7759 Main St, is appointed Referee to ascertain the rights of the
Hunter NY 12442 263-5077
parties and to proceed with the partition of the real property.

All papers, including this Decision and Order are being returned to the attorneys for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 14, 2007

Joseph C. Teresi
Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated April 12, 2007;
2. Affidavit of James F. Keefe, Esq. dated April 11, 2007 with attached exhibits;
3. Affidavit of Sherrie C. Kahn dated April 4, 2007;
4. Affirmation of Joseph H. Warren, Esq. dated May 8, 2007;
5. Affidavit of David H. Levy dated May 7, 2007 with attached exhibits A-C;
6. Affidavit of James F. Keefe, Esq. dated May 10, 2007.