

Wong v Chi-Kay Cheung

2007 NY Slip Op 34580(U)

February 27, 2007

Supreme Court, Tompkins County

Docket Number: 2006-0418

Judge: Robert C. Mulvey

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

DAVID WONG and SHET-FAI WONG,

Plaintiffs,

vs.

Index No. 2006-0418

CHI-KAY CHEUNG and BARBARA CHEUNG,

Defendants.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

**APPEARANCES: MICHAEL J. PICHEL, ESQ.
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**THE CROSSMORE LAW FIRM
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DECISION & ORDER

Mulvey, Robert C., J.

The plaintiffs commenced this action for an accounting by the defendants with regard to their jointly-owned apartment building. The defendants have counterclaimed for a judgment directing an accounting by the plaintiffs with regard to certain monies withdrawn from a bank account used in connection with the property, and for a partition sale of the property.

By prior consent Order, the Court appointed a Receiver of the rents and profits of the property.

The defendants now move for a judgment directing the sale and for an order directing the plaintiffs to turn over said funds to the Receiver.

The plaintiffs oppose the defendants' motion and cross-move for an order directing the defendants to comply with various discovery demands. The plaintiffs request that the defendants' motion for a sale be denied without prejudice to renewal after compliance with discovery and after accounting.

BACKGROUND

The plaintiffs are husband and wife. The defendants are husband and wife. Each of the parties owns a one-quarter interest in an apartment building located at 109 Summit Avenue in the City of Ithaca. The plaintiffs hold their interest as tenants by the entirety, as do the defendants. As between the plaintiffs and defendants, the property is held as tenants in common. The parties purchased the property in 1982. The plaintiffs managed the property for the first nine years and it has been managed since that time by the defendants until the appointment of the Receiver in October 2006.

The property is comprised of apartments and rooms rented to college students. It is not subject to a mortgage and is not subject to physical partition. The parties agree that the fair market value of the property exceeds one million dollars.

Prior to the commencement of the action, the plaintiffs withdrew the sum of \$40,000 from the bank account used in connection with the management of the property.

The plaintiff has submitted discovery demands to the defendants. The defendants contend that certain of the discovery requests by the plaintiffs are improper in that they do not specify the time and place of production, and that they have complied with the properly worded demand.

Both sides have alleged that they have received unequal distributions of the rents and profits of the property since they acquired it in 1982. The plaintiffs have alleged that the defendants have charged rents lower than the market allowed, and that they have wrongfully compensated themselves for management efforts.

DISCUSSION

1. Interlocutory Sale

Although the defendants' motion seeks ultimate relief on the counterclaims, it is not denominated as a motion for partial or complete summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules.

However, the plaintiffs have submitted detailed pleadings regarding the matters and have not revealed any issues of fact or law presented by the counterclaim for partition. The

parties have no dispute as to their respective rights or interests in the property. There is no dispute that physical partition of the property is impracticable and that a sale is appropriate. Therefore judgment on the counterclaim is appropriate. Doulon v. Diamico, 33 AD3d 841 (Second Dept., 2006)

The plaintiffs contend that the accounting must precede the sale. The defendants contend that the period for which the accounting is sought (more than twenty years) will necessarily take more than a year of litigation before it is ready for trial. The defendants argue that a delay in the sale will result in undue expense for the receivership.

An accounting of the income and expenses of the property during the period that each of the parties managed it is a necessary incident of a partition action and is had as a matter of right before the entry of either the interlocutory or final judgment, prior to the division of money between the parties. McVicker et al v. Sarma et al, 163 AD2d 721 (Third Dept., 1990), Zaveloff v. Zaveloff, 37 NYS2d 46, 52 (1942).

The plaintiffs have failed to demonstrate how a sale prior to the full accounting is prejudicial to their interests. Under these circumstances, the Court finds that a sale prior to the completion of the accounting is appropriate.

For these reasons, the defendants' motion for an interlocutory partition sale is granted.

2. Repayment of funds withdrawn

The defendants' motion for an order directing reimbursement by the plaintiffs for the pre-action withdrawal is denied, without prejudice to an application by the Receiver in the event such funds are necessary to the management of the property.

3. Discovery

The defendants are hereby directed to comply with the plaintiffs' First Notice to Produce as directed therein, for the entire period of management, no later than March 30, 2007.

CONCLUSION

THIS DECISION SHALL CONSTITUTE THE ORDER OF THE COURT.

Signed this 27th day of February, 2007 at Ithaca, New York.



ROBERT C. MULVEY, J.S.C.