

Berner v Olson

2008 NY Slip Op 30964(U)

March 17, 2008

Supreme Court, Suffolk County

Docket Number: 0010424/2007

Judge: Emily Pines

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

Index Number: 10424-2007

**Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County**

Present:

HON. EMILY PINES
J. S. C.

Original Motion Dates: 11-13-2007;
12-20-2007.

Motion Submit Date: 01-17-2008

Motion Sequence No's.: 001 MOTD
002 MOTD

ANN BERNER, X

Plaintiff,

-against-

ROGER D. OLSON,

Defendant.

X

Attorney for Plaintiff

John T. McCarron, P.C.
445 Broadhollow Road, Suite 124
Melville, New York 11747

Attorney for Defendant

Law Offices of Roger Olson, PRO SE
230 Park Avenue - Suite 2525
New York, New York 10169

ORDERED, that the motion (motion sequence number 001) by plaintiff for summary judgment pursuant to **CPLR §3212**, directing the sale of real property located at 757 Evergreen Avenue, Seaview, New York pursuant to **RPAPL Article 9** is granted to the extent that plaintiff is awarded partial summary judgment determining her right to partition and sale, subject to the determination of the parties' respective shares and interests therein in an accounting; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendant granting summary judgment on the First Counter-Claim for Breach of Contract and awarding a money judgment in the amount of \$40,000.00 is denied; and it is further

ORDERED, that defendant's application pursuant to **CPLR §3025(b)** for leave to amend his Verified Answer to include a cause of action for unjust enrichment is granted and defendant shall serve the Amended Verified Answer within twenty (20) days from the date herein; and it is further

ORDERED, that defendant's application, pursuant to **CPLR §3107**, for an Order directing plaintiff to appear for a deposition and provide documentary evidence is referred to a preliminary conference to be held on April 17, 2008 at 9:30 a.m. before the undersigned; and it is further

This is an action seeking a partition and sale of the premises known as 757 Evergreen Avenue, Seaview, New York (the "subject premises"). Plaintiff commenced the action by filing a Summons and Verified Complaint on or about April 23, 2007 and issue was joined by defendant's

service of a Verified Answer with Defenses and Counterclaims on or about June 29, 2007. Plaintiff served a Verified Reply to Counterclaims dated August 16, 2007. The submissions reflect that plaintiff and defendant purchased the subject premises as joint tenants with rights of survivorship by deed dated November 15, 1994. At the time of the purchase of the subject premises, the parties were in a self-described “committed relationship” which ended in 2006. During the period of their relationship, it appears the parties resided in an apartment in New York City owned by defendant, and purchased the subject premises on Fire Island as a summer vacation residence. Plaintiff alleges in the complaint that when the parties purchased the subject premises in 1994, they encumbered it with a mortgage and that from 1994 until the mortgage was paid off in 2006, she alone made the monthly payments of principal and interest as well as other expenses of the subject premises. Plaintiff seeks reimbursement from the sale proceeds for one-half of all payments made for mortgage, taxes, insurance and homeowner’s association fees for the subject premises. In 2006, defendant paid off the balance due and owing on the mortgage.

In the Verified Answer, defendant sets forth counterclaims for breach of contract, breach of an oral agreement and an accounting. Regarding the breach of contract, defendant alleges that on or about August 12, 2006 and again on August 31, 2006, he loaned plaintiff the sums of \$20,000.00 for a total sum of \$40,000.00 and that plaintiff promised she would repay these amounts but has failed to do so. On the breach of oral agreement counterclaim, defendant alleges that commencing in or about 1994, plaintiff represented she would undertake the obligation to make certain mortgage, interest and escrow payments for the subject premises in exchange for which he agreed to make all payments on the New York City residence, including rent, utilities, insurance, parking, etc. Defendant alleges that in 2006, plaintiff ceased making the agreed payments on the subject premises and defendant was forced to make the payments. Finally, defendant asserts a third counterclaim seeking an accounting.

Plaintiff now moves for summary judgment and an Order directing the sale of the subject premises pursuant to **RPAPL Article 9**, on the ground that a partition cannot be made without great prejudice, for the appointment of a referee to oversee the sale, and for an accounting to determine how the proceeds from the sale should be disbursed. Plaintiff alleges that as a joint tenant with rights of survivorship who no longer wishes to own the subject premises with defendant, she is entitled to a partition as a matter of right. She requests that the subject premises be listed with a licensed broker for a period of three months and if at that time, a contract of sale has not been signed, the property be sold at a public auction sale. Additionally, plaintiff requests an accounting be performed by the referee appointed after the sale of the subject premises and that all necessary adjustments be made regarding the distribution of the proceeds at that time.

Defendant opposes plaintiff’s motion and cross-moves for summary judgment on the first counterclaim for breach of contract and awarding a money judgment in the amount of \$40,000.00,

together with statutory interest. Defendant also seeks leave pursuant to **CPLR §3025(b)** to amend his Verified Answer to include a cause of action for unjust enrichment and seeks an Order pursuant to **CPLR §3107** directing plaintiff to appear for a deposition and provide documentary evidence relating to the claims and defenses of this lawsuit.

Defendant argues that plaintiff's motion for summary judgment should be denied as premature pursuant to **CPLR §3212(f)** because discovery has not yet occurred and plaintiff has not responded to outstanding discovery demands. Defendant asserts that such discovery is necessary prior to any judgment as a matter of law directing the sale of the subject premises. Defendant further argues that plaintiff has not demonstrated a prima facie entitlement to partition because she has failed to come forward with any evidence that she will sustain "great prejudice" if the subject premises is not sold at public action prior to an accounting. Defendant states that since the parties disagree regarding their respective shares of the proceeds of the subject premises, the Court cannot, on a motion for summary judgment determine their respective interests, rights and shares, prior to an accounting.

With regard to the cross-motion for summary judgment on the counterclaim for breach of contract, defendant argues that he has established a prima facie entitlement to summary judgment by the submission of copies of checks and the plaintiff's Verified Reply wherein she admits that defendant loaned her the funds. Additionally, defendant seeks leave to amend his Verified Answer to assert a counterclaim for unjust enrichment. Defendant alleges that during the parties' sixteen (16) year relationship, while they lived in his New York city apartment, he paid all the expenses relating to such apartment pursuant to a *de facto* oral contract. Specifically, he alleges, the terms of such oral contract were that he would make these payments regarding the New York City expenses in exchange for plaintiff paying the carrying charges on the subject premises. Additionally, he alleges that plaintiff received an additional benefit in that she took all of the tax deduction benefits arising from her payment of the mortgage and escrows on the subject premises. Defendant argues that he should be credited for the payment of all of plaintiff's rent, utility and automobile charges and the tax deductions she received during the twelve (12) years they owned the subject premises. Thus, he argues, he should be permitted to amend his Verified Answer to assert a counterclaim for unjust enrichment.

Finally, defendant requests that the Court schedule a preliminary conference to set a discovery schedule pursuant to **Uniform Rule 202.12**.

Plaintiff submits both a reply in support of the motion for summary judgment and opposition to the cross-motion. In reply, plaintiff argues that based upon the deed, and the allegations of the Verified Complaint and admissions in the Verified Answer, it is undisputed that plaintiff and defendant are the sole owners and hold title as joint tenants, thus satisfying the requirements for a

partition pursuant to **RPAPL §§901 and 903**. Moreover, she argues that since the subject premises consists of a single family home, it cannot be partitioned without great prejudice and should be sold. Plaintiff asserts that the Court has the authority to order the subject premises sold and an accounting be held, and the proceeds from the sale be distributed in accordance with the accounting. Plaintiff states that defendant's claim that discovery is necessary only goes to the accounting and not the sale of the property since the ownership interests are not in question. Plaintiff admits the accounting may require the production of documents and records by the parties if they intend to prove they are entitled to a distribution from the proceeds of sale beyond their respective interests as joint tenants. Plaintiff states she is not looking for an immediate distribution of the proceeds, but an interlocutory judgment ordering the sale and an accounting. Based on these arguments, plaintiff urges the Court to grant summary judgment ordering the sale of the subject premises and an accounting.

Plaintiff submits separate opposition to defendant's motion seeking summary judgment on the counterclaim for breach of contract. Plaintiff argues there are genuine issues of fact which preclude the granting of summary judgment. Specifically, plaintiff states that she does not dispute that defendant loaned her \$40,000 in August of 2006 and she agreed to repay such sum to defendant. However, plaintiff asserts that in August of 2006, when the parties ended their relationship, they agreed to sell the subject premises and plaintiff would repay the \$40,000 loan from the proceeds of the sale. She states the parties could not agree on a purchase price (for defendant to purchase plaintiff's interest) and defendant refused to permit her to list the subject premises for sale with a real estate broker, thus forcing her to commence the instant action. Therefore, plaintiff argues since the subject premises has not been sold, the loan is not yet due to be repaid and the motion for summary judgment must be denied. Plaintiff requests that defendant's claim for repayment of the loan should be included as part of the accounting.

Plaintiff also argues that defendant's request for leave to amend the Verified Answer to assert a counterclaim for unjust enrichment must be denied. Plaintiff submits that recovery for unjust enrichment is barred by a valid and enforceable contract and because defendant alleges there was an agreement between the parties, he should not be permitted to assert a claim for unjust enrichment. Plaintiff also argues on the merits of defendant's claim for unjust enrichment that she never had an ownership interest in defendant's New York City apartment, and in fact, defendant was unjustly enriched because she contributed more than \$50,000.00 toward renovation costs of the apartment. Thus, plaintiff urges the Court to deny defendant's motion to amend the Verified Answer to assert a claim for unjust enrichment.

RPAPL §901(1) states in relevant part that "A person holding and in possession of real property as a joint tenant...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." Thus, a plaintiff

in a partition action who establishes his/her ownership of the subject property and the property is “so circumstanced that a partition thereof cannot be made without great prejudice” is entitled to summary judgment directing that the real property be partitioned and sold at public auction. *Graffeo v. Paciello*, 46 A.D.3d 613, 848 N.Y.S.2d 264 (2d Dept. 2007)(internal citations omitted). *See also, Donlon v. Diamico*, 33 A.D.3d 841, 823 N.Y.S.2d 483 (2d Dept. 2006). Further, because a partition is equitable in nature, an accounting is a necessary incident thereto. *Tedesco v. Tedesco*, 269 A.D.2d 660, 702 N.Y.S.2d 459 (3d Dept. 2000).

Here, plaintiff has demonstrated entitlement to partial summary judgment by the uncontroverted allegations regarding the parties’ ownership of the subject premises as joint tenants with rights of survivorship. Moreover, plaintiff has established that the subject premises, a single family dwelling on Fire Island, could not be partitioned without great prejudice and thus must be sold. In opposition, defendant has failed to raise a triable issue of fact regarding either ownership or substantial prejudice. However, the Court finds that prior to the entry of an interlocutory judgment, based on the competing claims of the parties, an accounting is required to determine the respective rights of the parties to the proceeds. Said accounting shall also take into consideration defendant’s counterclaims for breach of contract and breach of an oral agreement.

With regard to defendant’s request to amend the Verified Answer, **CPLR §3025(b)** provides that “A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” It is well settled that leave to amend a pleading should be freely given unless the proposed amendment is wholly insufficient as a matter of law or patently devoid of merit. *Emilio v. Robinson Oil Corp.*, 28 A.D.3d 417, 813 N.Y.S.2d 465 (2d Dept. 2006); *Melendez v. Bernstein*, 29 A.D.3d 872 (2d Dept. 2006). Whether to grant or deny leave to amend is committed to the discretion of the Supreme Court. *Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957,471 NYS2d 55 (1983). Here, defendant seeks to assert a counterclaim against plaintiff for unjust enrichment. While plaintiff argues such claim is barred by defendant’s claim of breach of contract, such argument is without merit as pleading in the alternative is permitted. Thus, defendant is granted leave to amend his Verified Answer to assert a counterclaim for unjust enrichment.

Plaintiff’s motion for summary judgment is granted to the extent herein and this matter is set down for a preliminary conference on April 17, 2008 at 9:30 a.m. At the preliminary conference, the Court shall set a discovery schedule on the issue of the accounting and consider the appointment of a referee to sell the subject premises upon completion of the accounting. Defendant shall serve an Amended Verified Complaint within twenty (20) days from the date herein.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 17, 2008
Riverhead, New York



EMILY PINES
J. S. C.