

Whitmore v Callahan
2009 NY Slip Op 30187(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 602960/07
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

DAWN WHITMORE,

Plaintiff,

- v -

CHRISTOPHER H. CALLAHAN and
514-516 EAST 82 CORP.,

Defendants.

INDEX NO. 802960/2007

MOTION DATE 8/22/08

MOTION SEQ. NO. 003

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

This motion is decided in accordance with the accompanying memorandum decision.

FILED
JAN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1.23.09

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
DAWN WHITMORE

Plaintiff,

Index No. 602960/07
Mtn Seq. 003

-against-

CHRISTOPHER H. CALLAHAN and
514-516 EAST 82 CORP.,

Defendants.

WALTER B. TOLUB, J.:

This action, which ultimately seeks the partition and sale of an Upper East Side Manhattan cooperative apartment ("the apartment"), arises in connection with a divorce which was finalized in this State more than sixteen years ago. By this motion, plaintiff moves pursuant to CPLR 3212 for partial summary judgment on her complaint, and specifically seeks an order directing the partition and sale of the apartment. Plaintiff additionally seeks an order appointing a receiver to facilitate the requested sale and to perform an accounting of all profits and expenses pertaining to the apartment. In opposition, defendant cross-moves for a declaratory judgment that he is the sole owner of the cooperative apartment.

Factual Background

The apartment in question was purchased for \$67,900 in April of 1990 by plaintiff and defendant, who took the property as joint tenants with rights of survivorship. The vast majority of

the purchase price, \$60,900, was financed by a mortgage (Notice of Motion, Exhibit F).

In 1992, plaintiff commenced an uncontested divorce proceeding in New York County under Index No. 70927/1992 ("the divorce action"). The parties entered into a stipulation of settlement in the divorce action in October, 1992 ("the stipulation of settlement"). Contained within the stipulation of settlement, and important to the instant action, is Article VI, which set forth the obligations of both parties with respect to the subject apartment. Article VI of the stipulation reads, in entirety, as follows:

The parties are the owners of the cooperative apartment known as 514 East 82nd Street, Apartment 5R, New York, New York 10028 (hereinafter referred to as the "Coop"). The parties have agreed that **within ninety (90) days of the execution of this Stipulation, the Husband shall buy all of Wife's right, title and interest in the Coop by the payment of \$4,000.00 in full and final satisfaction of Wife's interest in said property. The Wife will deliver at closing all documents necessary to assign and transfer the proprietary lease and stock of the Coop to the Husband, who thenceforth shall be the sole owner of the Coop, free of any right or claim of the Wife. In consideration of the right to exclusive use and occupancy of the Coop from the date of the execution of the Stipulation, the Husband shall be responsible for all expenses of the Coop from the date of execution of this Stipulation.** The Husband shall be responsible for all transfer taxes or recording fees incident to delivery of the stock and assignment of the proprietary lease to him.

(Notice of Motion, Exhibit H, Stipulation of Settlement, Article VI (emphasis added)).

The Stipulation of Settlement was signed on October 13, 1992 and was incorporated, but not merged, into the Judgment of Divorce filed on January 22, 1993 (Notice of Motion, Exhibit G, Judgment of Divorce). With respect to Article VI of the stipulation of settlement, it is apparent to this Court that none of the delineated terms were satisfied within the identified time frame. Defendant admits that he did not pay plaintiff the \$4,000 owed to her. Plaintiff admits that she never transferred her shares of stock and interest in the proprietary lease to defendant, and it is apparent that there was never a "closing" for the subject apartment. (see, Notice of Motion, Notice of Cross-Motion). It also appears from the papers submitted that beginning in 2001 and extending through 2002, defendant made multiple late payments on the mortgage associated with the apartment (Notice of Motion, Exhibit H).¹

Litigation History

It bears noting that including the instant litigation, plaintiff has commenced a total of three actions against defendant since the resolution of the matrimonial action. A 1994 action commenced in Civil Court under index Number 005863/1994

¹ The mortgage however, was paid in full as of May 3, 2005 (id. Exhibit I).

("the Civil Court action") was filed to recover the amount of \$4,000.00 from defendant.² Defendant admits to defaulting in the Civil Court action (see, Notice of Motion, Exhibit B, Verified Answer ¶ 27), although no default judgment was ever taken.³

In 2004, plaintiff commenced a second action against defendant in New York County under Index Number 108596/2004 ("the 2004 action"). The 2004 action specifically sought modification of the stipulation of settlement under New York Domestic Relations Law § 234 so as to allow plaintiff to retain her one-half of the shares of stock and proprietary lease associated with the subject apartment (see, Notice of Cross-Motion, Exhibit E, 2004 Complaint, First Cause of Action). Damages were additionally sought based on claims that defendant's late mortgage payments had damaged plaintiff's credit (id., Second Cause of Action), and claims that defendant had improperly retained 100% of the profits associated with rental of the

²The nature of the claim advanced in the Civil Court action and it's relation to the instant litigation is unclear to the court and is disputed by the parties (see, Verified Answer and Counterclaim ¶ 25; Verified Reply to Counterclaim and Affirmative Defenses ¶ 7). A copy of the 1994 complaint was not submitted with the papers in this action.

³ Inasmuch as the motions before this court seek summary judgment, this court attempted to obtain the file for the Civil Court action. The file, now in archives, was not requisitioned. The Civil Court Deputy Clerk's office however, confirmed that there is no entry of Judgment in the case, and further confirmed that the last recorded activity in the Civil Court action occurred on February 18, 2004.

apartment (*id.*, Third Cause of Action). Motion practice in this action was commenced, but not resolved on the merits, as the presiding court deemed the 2004 action resolved by settlement on January 20, 2005. A stipulation of settlement however, though drafted and finalized, was never signed by the parties (see, Notice of Cross-Motion ¶11).

The instant action was commenced in 2007. Plaintiff, asserting a 50% ownership right in the subject property, seeks, among other things, an order directing the partition and sale of the property (first cause of action); half of all rentals earned on the property after April 27, 1990 (second cause of action); and damages predicated upon the claim that defendant's failure to timely pay mortgage payments damaged plaintiff's credit. Defendant, in opposition, has asserted a counterclaim for a declaratory judgment that he is the sole owner of the apartment.

This motion and cross-motion followed.

Discussion

As with any motion for summary judgment, the role of this court is limited to finding factual issues which would warrant trial (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]. See also, Barr, Altman, Lipshie and Gerstman, New York Civil Practice Before Trial, §37:91-92 [James Publishing 2007]). Success on either motion therefore rises or

[* 7]

falls on whether the opposing party presents evidentiary proof, in admissible form, that is sufficient to establish the existence of material fact requiring trial. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

Before this court addresses the parties' respective claims and objections however, the court first notes that the separation agreement at the core of this dispute was incorporated, but not merged into the divorce decree. The significance of this, is that the separation agreement remains an independent contract which binds the parties "unless impeached or challenged for some cause recognized by law" (Merl v. Merl, 67 NY2d 359 [1986]).

Claims of breach of contract are actionable in this state for a maximum of six years (CPLR 213(2)), and the cause of action arises on the date of the actual breach (Kronos, Inc. v. AVX Corp., 81 NY2d 90 [1993]). Separation agreements, and claims of breaches thereto, are not treated any differently (see, Chayes v. Chayes, 28 AD2d 355 [1st Dept 2006]). In the instant case, the separation agreement provision dealing with the apartment at issue clearly states that within ninety days of its execution, defendant was to pay plaintiff \$4,000 in exchange for plaintiff's share of right and title to the apartment. Based on a plain reading of the language, there also appears to have been two other events that were intended to take place within the same time frame: plaintiff was to present defendant with the necessary

documents transferring her share of ownership, and there was to have been a closing for the apartment. Defendant admittedly breached the contract on the 90th day after the contract's execution. Plaintiff's breach occurred shortly thereafter, and the parties collectively breached the agreement again when they failed to effectuate a closing. All of these breaches share one thing in common. They occurred at some point in 1993 and were time-barred, at the latest, by the end of 1999.⁴ Inasmuch as the terms of Article VI may not be enforced by either party, defendant's cross-motion is denied as a matter of law and the counterclaim is dismissed.

With respect to plaintiff's motion, plaintiff has established that she remains the holder of 50% of the apartment as a joint tenant with rights of survivorship and as such, may maintain an action in this court for the partition and sale of the apartment pursuant to §901 of the New York Real Property Actions and Proceedings Law. Inasmuch as defendant has failed establish the existence of material issues of fact thereby requiring a trial on this issue (Zuckerman v. City of New York, 49 NY2d 557 [1980]), plaintiff's motion is granted. Accordingly,

⁴ The court notes that the parties' claims may have actually been barred as *res judicata* as early as 1995 as a result of the Civil Court action which was commenced, defaulted upon, and then abandoned when plaintiff failed to seek leave to enter a default judgment within one year after defendant's admitted default (CPLR 3215[c]; Santoli v. 475 Ninth Ave Associates, LLC, 38 AD3d 411 [1st Dept 2007]).

it is

ORDERED that plaintiff's motion for partial summary judgment is granted; and it is further

ORDERED that a receiver shall be appointed in this matter upon plaintiff's submission of an appropriate order; and it is further

ORDERED that defendant's motion is denied in its entirety and the counterclaim is dismissed; and it is further

ORDERED that the Clerk of Court enter judgment accordingly; and it is further

ORDERED that the balance of this action shall continue.

Counsel for the parties are directed to appear in TA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on March 20, 2009.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/23/09

FILED
MAR 23 2009
CLERK OF COURT
NEW YORK COUNTY

HON. WALTER B. TOLUB, J.S.C.