

Stein v Robb

2010 NY Slip Op 30262(U)

February 3, 2010

Supreme Court, New York County

Docket Number: 108033/2007

Judge: Debra A. James

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.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

GEOFFREY STEIN and PATRICIA POGLINCO,
Plaintiffs,

Index No.: 108033/2007

Motion Date: 09/01/2009

- v -

Motion Seq. No.: 02

CAROLE ROBB,

Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

FILED

FEB 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiffs move for summary judgment directing either that the cooperative apartment known as Unit 4W in the Building located at 325 West 16th Street, New York, New York ("Unit") be physically partitioned between plaintiffs on the one hand and defendant on the other hand according to their respective rights and interests, or if the Court determines that actual partition cannot be made without prejudice to the rights of the parties, directing that the Unit be sold under direction of the court, and that the net proceeds of the sale be divided between plaintiffs on the one hand and defendant on the other hand, according to

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]

their respective rights.

Defendant cross moves for summary judgment dismissing the complaint.

In this action for partition, plaintiff Geoffrey Stein ("Stein"), a painter and co-plaintiff Patricia Poglinco, his wife, reside together at 25 East 9th Street, New York, New York. Defendant Carole Robb ("Robb") is an art teacher and painter. She resides in the Unit.

In 2005, Stein and Robb agreed to purchase the Unit, in which Robb would use the back portion of the Unit and Robb would use the front section, so that the space would be utilized on an essentially equal basis by each of them.

Ultimately, Stein, his wife and Robb agreed to purchase the Unit together at a price of \$850,000. Stein and his wife paid \$65,000 of the \$85,000 down payment, and Robb paid the remaining \$20,000. At the closing in September 2005, Stein and his wife paid 76% of the closing costs and Robb pay the balance. The parties make mortgage cost payments at the same percentages.

As aforesaid, the parties agreed that Stein and his wife would own 76% of the Unit and Robb would own 24% of the Unit. Negotiations between the parties to grant Robb a 30% interest in the Unit were never completed.

To effectuate the purchase, the parties had an interview with the cooperative Board of Directors. Prior to that

interview, the parties prepared a Draft Agreement that set out the terms of how they would own, use, occupy, control and sell the Unit. Though both parties agree that a Draft Agreement (the "Agreement") was presented to the Board at the interview, which the Board agreed to pass to their attorney for approval, the parties present different versions of the Draft Agreement to the court. The chairman of the Board of Directors states that the Board approved the purchase of the Unit in reliance upon the representation of the parties that they had agreed to the terms of the Agreement that defendant appends to her cross motion.

The draft Agreement offered by each side provides for a five year period of ownership by the parties before any party may either cause the sale of the Unit or buy-out the other parties' shares in the Unit. Both sides agree that no Agreement was ever executed by any of the parties.

By February 2006, the parties were unable to agree upon the use, occupation and control of the Unit. Stein complains, *inter alia*, that Robb dumped a heavy wooden wall section into his Unit, which at his time and expense, he cut into moveable sections for trash collection and that she built a loft bed that intrudes into his section of the Unit, substantially reducing his share of the painting wall, which he planned to use to create his work. Robb avers that the heavy wall section was not hers but was left by the previous owner, and that in fact Stein used a heavy wooden

screen bolted to the floor left by that owner, without complaint. She points out that during their negotiations, Stein never complained about the location of the loft bed and that he never raised the painting wall issue until after the commencement of the lawsuit. Also, in 2005 when the parties purchased the Unit and later in February 2007, Stein never objected to her use of his portion of the painting wall to display her work.

Real Property Actions and Proceedings Law § 901(1) provides:

A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for sale if it appears that a partition cannot be made without great prejudice to the owners.

A tenancy in common exists when two or more persons each own and possess an undivided interest in property, real or personal. Joint tenants own and possess an undivided interest in real or personal property, but have the additional right of survivorship. Chiang v Chang, 137 AD2d 371, 373 (1st Dept 1988). There is no dispute that in this action, plaintiffs and defendant Robb have an undivided interests in the Unit, without a right of survivorship, and are tenants in common.

Chiang v Chang, supra, as argued by the plaintiffs, is the controlling case. In reversing the trial court order dismissing the complaint, the First Department held that RPAPL § 901(1) is available as a remedy with respect to cooperative apartments, defining partition as

the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interest therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed according to the respective interests.

Chiang v Chang, 137 AD at 373 (internal citation omitted.)

The Chiang Court further noted (*id.*, 137 AD2d at 373):

It is also a generally held view that absent an express agreement to the contrary, a testamentary restriction against partition, or extreme prejudice to a co-owner, a partition is a matter of right of a co-owner who no longer desires to hold or use the property in common.

It then specifically held that cooperative apartments are subject to partition (137 AD2d at 376):

Simply put, judicial intervention is sought because there has been a breakdown in the relationship between the co-owners impinging on their ability to enjoy peacefully the occupancy rights to the apartment, making the focus of the action for partition, quite naturally, the apartment, not the stock. There is absolutely no reason then, not to have this action governed by Article 9 of the RPAPL.

Robb argues that a judicial partition would violate the By-Laws of the cooperative corporation and the proprietary lease, as they require the corporation's approval of any sale of shares of stock as well as the assignment of such lease, and give the other shareholders a right of first refusal. This court disagrees with Robb, since any sale pursuant to judicial partition could and would be carried out in accordance with the By-Laws and proprietary lease.

[* 6]

She also argues that the Agreement, upon which the Board relied in approving the purchase by the parties of the Unit, has been partially performed by the parties and constitutes an express five year prohibition against partition. Both Agreements provide that the parties would split the maintenance and utility bills evenly and use the Unit equally, and the parties have performed in accordance with such terms. Robb's argument is that such partial performance is unequivocally referable to the Agreement, and that the court should enforce the five year ownership provision that is common to both drafts presented to the court.

"Agreements among owners of real estate not to bring an action to partition during a certain period of time are not uncommon, and where such an agreement is made it is a good defense to an action to partition." Buschmann v McDermott, 154 AD 515, 517 (1913). However, such agreements must meet the strictures of the Statute of Frauds. The Court of Appeals decision in Wills v Wills, 28 NY2d 645 (1971) is instructive. As the husband's execution of the power of attorney in Wills (28 NY2d at 646), the equal division of the maintenance and the space among the parties here does not constitute partial performance sufficient to remove the bar of the Statute of Frauds, since such performance is not unequivocally referable to a five year bar

against partition. Without such express agreement, Robb may not suspend the power of alienation by way of partition.

Nor persuasive is Robb's argument that she would be extremely prejudiced in the event that her living space is divided in half or sold entirely, given her unequal bargaining power due to the fact that the plaintiffs are lawyers who have the financial resources to purchase her share in the Unit. As the nature of a partition action is to force a division or sale of the Unit, such circumstance alone cannot establish extreme prejudice to co-owner Robb such as would bar partition. In this regard, the refusal of plaintiffs to carry out the supposed bargain of five year ownership, in and of itself, does not give rise to an inference of fraud excusing the application of the Statute of Frauds. Wills v Wills, 28 NY2d at 646.

Certainly, under the By-Laws and proprietary lease, the corporate Board has every right to take into account the absence of an Agreement between the parties in approving or disapproving any offer to purchase or proposal to partition the Unit.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is GRANTED and the cross-motion for summary judgment is DENIED; and it is further

ORDERED that it is declared that the plaintiffs have 76% of the rights and title and the defendant has 24% of the rights and

title to the shares of the cooperative apartment known as Unit 4W in the building located at 325 West 16th Street, New York, New York and to the proprietary lease, and that the matter is remanded to a Special Referee to hear and report whether the Unit may be physically partitioned between the plaintiffs on the one hand and the defendant on the other hand according to their respective rights and interests, or alternatively to determine that no actual partition can be made without prejudice to the rights of the parties and that a sale of the Unit under supervision of the court be directed and that the net proceeds of the sale be divided between plaintiffs and defendant according to their respective rights and interests, and whether the approval of the cooperative Board of Directors to either or both alternatives may be obtained, and it is further

ORDERED that the Special Referee is to hear and report pursuant to CPLR 4311, and that the reference is to be conducted and the report filed pursuant to CPLR 4320.

This is the decision and order of the court.

Dated: February 3, 2010

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

FILED
 FEB 05 2010
 NEW YORK
 COUNTY CLERK'S OFFICE