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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 115578/2008
CRESTWOOD CAPITAL GROUP
VS.
SCHEUERMANN, MIRIAM E.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/1/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: October 5, 2010

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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CRESTWOOD CAPITAL GROUP CORP.,
Plaintiff,

-against-

Index No. 115578/2008

MIRIAM SCHUERMANN, ELAINE MONTGOMERY, CORNELIUS CREGAN, LLC, and GINGER ESTATES, INC.,
Defendants.

Joan A. Madden, J.

In this action for partition, plaintiff Crestwood Capital Group Corp. ("Crestwood") moves for summary judgment on its complaint and for the dismissal of the affirmative defenses asserted by the defendants (motion seq. no. 001). Defendants Elaine Montgomery ("Montgomery").[1] and Cornelius Cregan, LLC ("Cregan, LLC") (together, the "Defendant Owners") oppose the motion

Background

Crestwood and Cregan, LLC are currently co-owners, of a Building (the "Building) and underlying land located at 710 Third Avenue, New York, New York (the "premises"). Crestwood and Cregan, LLC each own a 50% interest in the premises. The Building has eight residential apartments and a commercial space on the ground floor.

The premises was purchased by Montgomery's father, Cornelius Cregan ("Cornelius") in 1927. On November 7, 1957, Cornelius entered into a triple-net ground lease (the "Lease") with

[1] Defendant Montgomery is also known as Miriam E. Schuerman. She was born Miriam Elaine Cregan and became Miriam E. Schuermann after she married her first husband from whom she is now divorced. After she married for a second time, she changed her name to Elaine Montgomery.

Ginger Estates, Inc. ("Ginger") for the Building. The Lease is for a period of 20 years and contains two 20 year renewal options.

The Lease specifies an annual rent of $11,000, during the first five years of the lease term, to be paid in equal monthly installments. Lease, at 3. The Lease states that this rate is to be increased every five years during the original lease term and that the annual rent for each of the last five years of the original lease term is $14,000. Id. The Lease specifies that the net annual rent payable for the first renewal period is to be the greater of (1) the final annual rent at the end of the original term or (2) "a sum equal to 6% of the then appraised value of the land which is subject to the renewal lease, at the commencement of the term thereof, considered as unimproved..." With respect to the second renewal period, the Lease specifies that the rent is to be the greater of (1) the final annual rent at the end of the original term, or (2) an amount determined according to the same formula set forth in the first appraisal option except that the appraised value is to be determined at the time of the second renewal period.

The Lease further specifies that Ginger shall, as additional rent:

> pay and discharge all such taxes, water rents or charges as shall during the term herein granted, and such assessments and other duties, charges or payments, ordinary or extraordinary, foreseen or unforeseen, general or special, as shall from and after the date hereof, be imposed, assessed, levied, or become a charge or lien upon the premises hereby demised, or any part thereof, or anything appurtenant thereto...

Lease, at 11.

After Cornelius passed away in 1959, Montgomery inherited a one third interest in fee in the premises. Montgomery's sister, Ellin C. Matteo ("Matteo"), and Montgomery's mother, Miriam B. Cregan ("Cregan"), also each acquired one third interests in the premises in fee. By way of quitclaim deed dated May 14, 1965, Cregan conveyed one half of her interest in fee to

Montgomery and the other half to Matteo. Thus, giving Montgomery and Matteo each a 50% ownership interest in the premises. Ginger exercised both of its renewal options, and the annual rent rate determined for each renewal period was $14,000 or $1,166.66 per month.[2] The Lease is set to expire on December 31, 2017. Ginger did not pay real estate taxes for several years of its lease term and accumulated a number of building violations during or prior to 2008. Montgomery Aff. at ¶18-9.

According to Montgomery, over the course of the period that she owned the premises together with Matteo, they became more and more distant from each other, and apparently had difficulty cooperating with respect to the premises. Id. at ¶12.

Montgomery states that, beginning in 2004, people "kept coming to [her] door trying to buy her interest" in the premises and that she "was constantly harassed and threatened that terrible things would happen if [she] did not sell;" however, she is not sure whether any of these people were representatives of Crestwood. Id. at ¶13.

On August 20, 2007, Matteo conveyed her entire interest in the premises to Crestwood for $1,000,000. Crestwood gave Matteo a purchase money mortgage in the sum of $800,000, which became due and payable by its own terms on September 1, 2008. Crestwood filed a satisfaction of mortgage with respect to its mortgage to Matteo which was recorded on July 16, 2009. On September 22, 2008, Harvey Weisman ("Weisman"), as mortgagee, and Crestwood, as mortgagor, executed a mortgage agreement for $498,000 which was secured by Crestwood's interest in the premises. Daniel Fisher ("Fisher"), the vice-president of Crestwood, states in his

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[2] It is unclear from the record whether the amount of annual rent charged for each renewal period would have been greater under the appraisal options provided under the terms of the Lease. However, it appears that Montgomery and Matteo assumed that $14,000 to be greater than the rent calculated according to either of the appraisal options. Since it purchased Matteo's one-half interest in the premises Crestwood apparently has not challenged the amount of annual rent charged to Ginger.

affidavit that Crestwood's only asset, and only source of generating revenue, is the premises. Fisher Aff. at ¶7.

Montgomery asserts that she was not aware that Matteo sold her interest in the premises until she received a letter of introduction from Crestwood, dated September 24, 2007. The letter requested that Montgomery respond, and Montgomery stated that she believed her daughter responded on her behalf. Montgomery believes that at that time Crestwood informed her daughter that it wanted to purchase Montgomery's interest in the premises for $1,000,000. Montgomery Aff. at ¶15. Montgomery states that thereafter she received numerous solicitations from Crestwood seeking to discuss the sale of her interest in the premises, but she was not interested in selling, particularly for what she considers to be too low a price.[3] Id. at ¶16. On the other hand, Fisher asserts that the Defendant Owners have been "utterly non-responsive...and have refused even to communicate with [Crestwood], let alone participate in ventures together concerning the Building."

Montgomery states that, after learning of the sale by her sister and because of "constant harassing solicitations from Crestwood," she asked her children to assist her in dealing with Crestwood and in making sure Ginger lived up to its Lease obligations. Montgomery further states that, at her children's request, she retained the law firm of Jaffe, Ross & Light, L.L.P. ("Jaffe, L.L.P.") to make sure that "all taxes were paid and violations removed and to handle the situation with Crestwood." Id. at ¶18. Montgomery states that she never refused to communicate with Crestwood, but after Crestwood repeatedly bombarded her with telephone calls and visits to offer her $1,000,000 for her interest in the Building, she directed Crestwood to speak only to her attorney, Burton Ross ("Ross"), at Jaffe, L.L.C. Id. at ¶21.

[3] On February 29, 2008, Crestwood, in an e-mail to Maureen Dean ("Dean"), daughter of Montgomery, made a "one time offer good for 72 hours" to purchase Montgomery's interest for $2,000,000. However, it appears that most of Crestwood's offers were for $1,000,000.

On November 28, 2008, by way of quitclaim deed, Montgomery conveyed her entire 50% interest in the premises to Cregan, LLC, which appears to be wholly owned by Montgomery.

Crestwood has submitted copies of e-mail correspondence between it and representatives of Montgomery (e.g. Ross and Dean). These e-mails include discussions of Crestwood's repeated offers to purchase Montgomery's interest in the premises, as well as a request by Crestwood to meet with Ross to discuss how to maximize the revenue generated by the premises. The e-mails show that Ross agreed with Crestwood to discuss ways to maximize the revenue from the premises on the same day that an e-mail from Crestwood requested that this be done.

According to Montgomery, it has always been her plan to wait to sell the premises until the expiration of the Lease. She asserts that she does not believe that it is possible to realize any more income from the Building than is currently being realized, unless the Lease is bought out, but she has not refused to participate in discussions of how to generate additional revenue from the Building. Montgomery is now approximately 85 years old, and her husband, James Edward Montgomery is 91 years old. Montgomery considers the Building to be her family's principal asset and the only asset that she has to leave to her children. Montgomery Aff. at ¶6. She further states that "[i]t has always been [her] intention for [her] interest in the [B]uilding, and the proceeds from the sale of the [B]uilding, to be her final legacy and gift to [her] family." Id. at ¶7.

Crestwood commenced this action on November 19, 2008, by filing and service of a summons and complaint. On or around January 26, 2009, Crestwood filed a supplemental summons and first amended verified complaint against the Defendant Owners "for a partition and division of the Property... or, if partition...cannot be made without great prejudice to the

parties and/or damage to the Property, then for a sale of the Property and a division of the proceeds." However, the complaint also states that the only feasible method of partitioning the property is by sale.

Montgomery submitted an answer to the complaint which asserted affirmative defenses that (1) defendant Miriam Schuermann (Montgomery's former name) is not a necessary or proper party to this action,(2) this court lacks personal jurisdiction over her due to improper service of the summons and complaint, (3) Ginger is a necessary party to the action, (4) Crestwood's complaint is deficient in that it failed to allege Weisman's consent to partition and sale, (5) Crestwood failed to join Weisman who is a necessary party to this action as he holds a mortgage on Crestwood's interest in the premises.[4]

Cregan, LLC submitted an answer containing the same defenses asserted in Montgomery's response, except that it asserted an additional defense that partition and sale would cause great prejudice to it, and did not assert a defense of improper service upon Montgomery.

Crestwood now moves for summary judgment on its complaint, arguing that Crestwood and Cregan, LLC are tenants in common and that it is entitled to an order of partition and sale since physical partition would cause great prejudice to both parties and as the Defendant Owners cannot demonstrate, by admissible evidence, that any great prejudice would result if the court directed partition by sale of the premises. Rather, Crestwood asserts that great prejudice would result to it if sale is not ordered as it cannot run a profitable business receiving $583.33 a month.

[4]Montgomery and Cregan LLC each asserted an affirmative defense alleging that Matteo was a necessary party but subsequently withdrew it based on proof that there had been a satisfaction of the mortgage obtained by Crestwood to purchase Matteo's share of the Building.

Crestwood further argues that it has tried to work with Montgomery to increase the profit potential of the Building, but she has been uncooperative and has a fundamentally different vision for the future of the Building. Fisher states that Montgomery wishes to treat the Building as a valuable family heirloom and maintain the status quo. Fisher Aff. at ¶13.

Crestwood argues that the defenses asserted by the Defendant Owners are without merit and have been pled with insufficient facts. Crestwood asserts that the Defendant Owners' defense that the complaint should be dismissed because Crestwood did not join Weisman or allege his consent to be bound by any judgment in this action must fail because it had no contractual or other obligation to join Weisman as a party to this action, and Weisman has agreed to be bound by any judgment in this action in any event.

The Defendant Owners oppose Crestwood's motion. They assert that the sale of the premises with the Lease in effect will prejudice as it will generate substantially less than it would once it is unencumbered. The Defendant Owners assert that Montgomery is not merely keeping the Building for sentimental reasons and that she actually wishes to sell the premises after the Lease expires. The Defendant Owners also argue that Crestwood has failed to demonstrate or allege that Crestwood can raise more income from the premises as a result of an appraisal of the land subject to the lease or by buying out Ginger. Montgomery further argues that Crestwood knew of the Lease and its restrictions when it purchased Matteo's interest and should not now be allowed to cause the Defendant Owners to bear the burden of this questionable business decision.

The Defendant Owners also argue that summary judgment is not warranted as, at the very least, there are triable issues of facts as to whether the equities balance in their favor. The Defendant Owners assert that the inequity in this case would be that Montgomery, who has in

effect owned the Building for 50 years, would be forced to sell solely based on their refusal to accept Crestwood's offer to purchase the Defendant Owners' interest at an unreasonably low price. The Defendant Owners further assert that Montgomery has not been uncooperative or refused to discuss possibilities of increasing profit potential, rather the contacts Crestwood has made with her have been in regard to buying the Defendant Owners' interest in the premises.

In reply, Crestwood asserts that Montgomery has a history of uncooperativeness and points to a holdover proceeding that Matteo instituted in the past, seeking to have Ginger removed from the Building, which was ultimately dismissed because Montgomery refused to participate. Crestwood further asserts that the Defendant Owners are undermining its attempts to increase revenue from the Building by refusing Crestwood's offer to buy their interest. Crestwood also points to e-mails it submits as purported examples of the Defendant Owners' uncooperativeness.

In their sur-reply, which was submitted after obtaining permission from the court, the Defendant Owners assert that the e-mails show that they were responsive to Crestwood. With respect to the e-mail regarding discussion of ways to maximize revenue from the premises, Montgomery argues that the e-mails reflect that it responded on the same day it received the request from Crestwood for discussion and agreed to a discussion with Crestwood, although it appeared that no meeting ever took place.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the

party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Under New York Real Property Actions and Proceedings Law ("RPAPL") §901(1), "[a] person holding...real property as... [a] tenant in common...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." In accordance with the RPAPL and common law "a party, jointly owning property with another may, as a matter of right, seek physical partition of the property or partition and sale when [it] no longer wishes to jointly own or use the property." Manganiello v. Lipman, 74 AD3d 667, 668 (1st Dept 2010)(citations omitted). At the same time, however, "[t]he right to seek partition...is not absolute and may be precluded where the equities so demand...." Id. (citations omitted).

In this case, Crestwood, by demonstrating its ownership and right to possession of the premises, has met its prima facie burden entitling it to summary judgment on its claim for partition and sale.[5] Id. However, Defendant Owners have raised triable issues of fact as to whether the equities favor their position. See Arata v. Behling, 57 AD3d 925 (2d Dept 2008)(affirming trial court's denial of summary judgment where defendant in action seeking partition and sale of jointly owned property raised issues of fact concerning the equities of her position);Ripp v. Ripp, 38 AD2d 65, 68 (2d Dept 1971), aff'd, 32 NY2d 755 (1973)(noting that a party seeking partition "concedes the court's authority to compel him to deal equitably with his co-tenants").

[5]There is no dispute that a physical partition of the premises cannot be made without great prejudice to the owners, and thus the only issue is whether there should be a partition by sale.

Specifically, the record shows that he premises has been in Montgomery's family for more than 50 years, and that small amount of income generated by the premises was the result of the double lease renewal options in the Lease with Ginger which is due to expire on December 31, 2017, and that at time, Montgomery intends to sell the premises, and for the profits from the sale to be her legacy to her four children. Furthermore, barring an extraordinary shift in the real estate market, a sale of the premises prior to the Lease's expiration will result in a drastic decrease in the amount to be realized by the sale in approximately seven years.

While Crestwood asserts that the small amount of income generated by the premises is harming it financially, especially since the premises is its only asset, this factor is insufficient to tip the equities in its favor as a matter of law, particularly as Crestwood knew about the Lease when it purchased Matteo's interest in the premises, and undertook the risk that Montgomery would not want to sell her half. Additionally, at the very least, the record raises factual questions as to whether Crestwood's ability to profit from the premises was the result of Montgomery's purported refusal to cooperate with their unspecified business plans as opposed to the existence of the Lease. In fact, the record suggests that Crestwood's business plan was limited to attempting to purchase the Defendant Owners' share of the premises, and there is no evidence that the amount they were offering was fair in view of the potential profit to be made from selling the premises after the expiration of the Lease. Accordingly, as the record raises factual issues with respect to the equities of this case, summary judgment must be denied.

Moreover, contrary to Crestwood's position, Peebles v. Peebles, 40 AD3d 1388 (3d Dept), lv dismissed, 9 NY3d 892 (2007), is not dispositive here. In Peebles, Appellate Division, Third Department upheld the trial court's grant of summary judgment directing the sale of a lakeshore property owned by four siblings over the objection of one of the siblings on the ground

that their parents hoped that the property would stay in the family. While any purported desire by Montgomery to keep the premises in the family would be an insufficient basis to deny partition and sale, the loss of profit that would result from the sale of the premises before the expiration of the Lease, together with the other circumstances surrounding Crestwood's purchase of the premises and its efforts to purchase it from Montgomery, preclude summary judgment here.

With respect to the affirmative defenses asserted by both of the Defendant Owners, the defense that Montgomery was improperly joined as a party under her former name is unavailing as it contains no explanation of why Montgomery is an improper party or that the Owner Defendants are prejudiced by the joinder. Next, the defense that a sale of the premises cannot be ordered since Crestwood did not allege that Weisman consented to the sale in its complaint or join Weisman as a party is without merit as Crestwood submits evidence that Weisman agreed to be bound by any judgment in this action (See Exhibit I to Crestwood's Motion). Harrison v. Higgins, 218 N.Y. 556, 560 (1916) (finding that plaintiff's failure to join a mortgagee whose consent is required for partition can be cured if the mortgagee stipulates to be bound by the judgment).

In addition, the defenses related to the failure to join Ginger as a party are moot since after the submission of the initial papers, Ginger was joined as a party, and pursuant to the stipulation between the parties, Ginger was permitted to answer and to submit the affidavit of its President Richard Bonfiglio who states that Ginger "takes no position in this action, or on this motion other than to oppose any order or judgment that would in any way impair, terminate or liquidate...Ginger's right under the Lease" Bonfiglio, Aff. ¶ 4.

Next, Montgomery's defense of lack of personal jurisdiction must be dismissed based on her failure to move to dismiss the complaint on this ground within 60 days of filing her answer as required under CPLR 3211(e).

As for Cregan, LLC's sixth affirmative defense, that a sale would result in great prejudice to it since the value of the premises will be adversely effected by the sale while the Lease is still in effect, as this defense relates to whether the equities favor the partition and sale, the request to dismiss it must be denied for the reasons stated herein.

In view of the above, it is

ORDERED that Crestwood's motion for summary judgment is granted only to the extent of dismissing the defendant Elaine Montgomery's affirmative defenses and defendant Cornelius Cregan, LLC's first, second, third, fourth and fifth affirmative defenses and is otherwise denied;

ORDERED that the parties shall appear for a settlement conference on October 28, 2010 in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: ~~September~~ October 5, 2010

J.S.C.