

**Cantor v Schamel**

2011 NY Slip Op 30996(U)

April 4, 2011

Supreme Court, Suffolk County

Docket Number: 06321-2010

Judge: Melvyn Tanenbaum

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SHORT FORM ORDER

INDEX NO.06321-2010

4-4-11

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #001, #002 & #003 Mot D  
R/D:11/04/2010  
S/D:12/10/2010

DAVID ANDREW CANTOR,

Plaintiff,

-against-  
PETER AUSTIN SCHAMEL and BANK OF  
AMERICA, N.A.,

Defendants.

PLTF'S/PET'S ATTY:  
BRADY KLEIN WEISSMAN, LLP  
501 Fifth Avenue  
Suite 1900  
New York, NY 10017

DEFT'S/RESP'S ATTY:  
NABLI & ASSOCIATES  
60 E. 42<sup>nd</sup> Street  
Suite 1338  
New York, NY 10165

BANK OF AMERICA - Prose  
301 South Kings Drive  
Charlotte,NC 28204

Upon the following papers numbered 1 to 23 read on this motion for an order pursuant to CPLR Sec 3212  
Notice of Motion/Order to Show Cause and supporting papers 1-5 ; Notice of Cross  
Motion and supporting papers 6-10, 11-15 Answering Affidavits and supporting papers \_\_\_ Replying Affidavits and  
supporting papers 16-19, 20-21 Other 22-23 ; (and after hearing counsel in support and opposed to the  
motion) it is,

**ORDERED** that this motion by plaintiff DAVID ANDREW CANTOR ("CANTOR") for  
an order pursuant to CPLR Sections 3212 & 8101 and RPAPL Sections 901, 911 & 915: 1) granting  
summary judgment against the defendants; 2) directing the partition and sale of premises known as  
81 Black Duck Walk, Fire Island Pines, New York; and 3) awarding attorneys fees to plaintiff and  
the cross motion by defendant PETER AUSTIN SCHAMEL ("SCHAMEL") for an order pursuant  
to CPLR Section 3212 denying plaintiff's motion and granting summary judgment dismissing  
plaintiff's complaint are determined as follows:

These parties shared a personal relationship from February, 1998 until spring, 2005. As joint  
tenants they purchased premises located on Fire Island. In January, 2006 and October, 2007 plaintiff  
"CANTOR" filed two actions against defendant "SCHAMEL" in Supreme Court, New York County  
seeking money damages due as a result of their domestic partnership and partition of their jointly  
owned New York City condominium. On March 31, 2008 "CANTOR" and "SCHAMEL" entered  
into a "Settlement Agreement" resolving all issues related to both actions including a conditional  
transfer of title of the Fire Island residence.

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The 2008 "Settlement Agreement" provides:

3.1 Schamel agrees to purchase and Cantor agrees to sell Cantor's one half interest in the Fire island house for the sum of \$125,000.00 (One Hundred and Twenty Five Thousand Dollars), without set off or offset of any kind (the "Purchase Price") and to arrange for Cantor to be released from all liability related to the Fire Island mortgage and note within sixty (60) days of the Closing of the Condominium.

3.2 If Schamel intends to refinance the purchase of the Fire Island House, within five (5) days of execution of a contract for the sale of the Condominium, Schamel shall apply to refinance the mortgage related to the Fire Island House.

3.3 Within ten (10) days of the closing of the sale of the Condominium, Schamel shall close on his purchase and refinance of the Fire island House. If Schamel is not ready to close on the purchase and refinance of the Fire Island House within ten (10) days of the closing of the sale of the Condominium, the Purchase Price shall be released to Cantor provided Cantor has signed all documents necessary to complete the transfer of the Fire island house from Cantor and Schamel to Schamel and deposits the documents in escrow with the escrowee as defined in Section V below. The documents shall be released pursuant to paragraph 3.5 below.

3.4 Schamel agrees to act in good faith with respect to the refinance of the Fire island House and to pay any and all costs, fees and expenses, including any and all unpaid property taxes, transfer taxes, recording fees, points, mortgage fees, appraisal fees, application fees, title service fees, inspection fees, assessments mortgage broker fees, discharge of any liens or encumbrances, satisfaction of any existing mortgage, credit lines, attorneys fees, or any other fees or costs of any kind whether known or unknowns, associated with Schamel's refinance of the Fire Island House.

3.5 Upon the closing of the refinancing of the Fire Island House or ten (10) days after the closing of the sale of the Condominium, whichever is sooner, Cantor shall receive the purchase price from the Escrow Fund, plus any interest accrued thereon, without any set off or offset of any kind. The Deed and transfer documents executed by plaintiff transferring the Fire island House from Cantor and Schamel to Schamel then held in escrow [in the form attached thereto as Exhibit A] shall be released to Schamel at the Closing of the refinancing and discharge from liability on the current mortgage.

3.6 the Parties acknowledge and agree that Schamel has and shall continue to have sole and exclusive use and possession of the Fire Island House.

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3.7 Schamel represents that the mortgage for the Fire island house is current or will be made current within (3) business days of execution of this Agreement and that it shall be kept current until the closing of the sale of the Fire Island House. This is a material term of this Agreement. The parties agree that neither shall grant any security interest in or mortgage the Fire island house, transfer any interest in the Fire Island house, make any improvements in the Fire Island House, fixtures or appliances from the Fire Island House or make any modifications to the Fire Island House whatsoever without the advance written consent of the other Party.

3.9 The Parties agree that the expenses incident to their ownership of the Fire island House, including the mortgages, equity line of credit, association fees, taxes, homeowner's and flood insurance, utilities, maintenance, repairs and any other expenses including damages related to the Fire Island house (the "Fire island House Costs of Ownership") shall be paid by Schamel in consideration of his exclusive use and occupancy of the Fire island House and Schamel shall indemnify and hold Cantor harmless from any Fire Island House (sp.) Cost of Ownership unless caused by Cantor.

On April 22, 2009 the parties' New York City condominium was sold. In accordance with the terms of the Agreement, proceeds of the sale were divided equally between the parties less \$125,000.00 from "SCHAMEL's" one-half share. That sum represented the amount "CANTOR" accepted as payment for his one-half interest in the Fire Island premises. On May 4, 2009 "CANTOR" received the \$125,000.00 payment from his attorney's escrow fund.

Plaintiff claims that defendant defaulted under various terms of the parties "Settlement Agreement" including:

- 1) failing to arrange for "CANTOR" to be released from liability with respect to the Fire Island mortgage and note within 60 days of the condominium closing (paragraph 3.1);
- 2) failing to refinance or assume the mortgage on the Fire Island house within five days of execution of the contract of sale for the condominium (paragraph 3.2);
- 3) failing to refinance or assume the mortgage within ten days of closing on the condominium (paragraph 3.3);
- 4) failing to act in good faith with respect to refinancing the mortgage (paragraph 3.4);
- 5) failing to make timely monthly mortgage payments (paragraphs 3.7 & 3.9).

Plaintiff's motion seeks an order granting partition of the premises based upon defendant "SCHAMEL's" breach of the "Settlement Agreement" together with an award of reasonable

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attorneys fees. In support and in opposition to defendant's cross motion, plaintiff "CANTOR" submits an affidavit and three affirmations of counsel and claims that defendant's failure to have "CANTOR's" name removed from the mortgage as required under the settlement agreement's terms mandates that the premises be partitioned and sold. Plaintiff contends that the undisputed facts show that defendant breached the terms of the agreement by failing to timely refinance the mortgage or, in the alternative, sell the premises and that the only adequate remedy under the circumstances is for the appointment of a referee to partition and sell the premises. Plaintiff claims that defendant has provided no reasonable excuse for his failure to abide by the terms of the parties settlement agreement and that as a result his credit rating has been adversely affected by defendant's breach. Plaintiff argues that until the deed conveying his interest to "SCHAMEL" is recorded he remains a joint tenant and has the right to petition to partition the premises. Plaintiff also claims that attorneys fees must be awarded since paragraph 13.4 of the Agreement specifically provides for an award based upon defendant's bad faith conduct.

In opposition and in support of the cross motion, defendant "SCHAMEL" submits an affidavit and two affirmations of counsel and claims that plaintiff does not have standing to maintain a partition action since he conveyed his one-half interest in the premises to defendant as part of the Settlement Agreement. Defendant claims that even though the deed is presently held in escrow, "CANTOR" is no longer a joint tenant and is a tenant in common. Defendant claims that under the terms of the Agreement "SCHAMEL" was granted the right of sole and exclusive possession of the premises and that absent possession "CANTOR" has no basis to seek partition. Defendant also claims that there is no requirement under the terms of the agreement that "SCHAMEL" sell the premises and asserts that his failure to refinance the mortgage is due to unforeseen circumstances including a prolonged illness. Defendant maintains that plaintiff is not entitled to an award of attorneys fees since "SCHAMEL" has acted in good faith while attempting to refinance the mortgage. Defendant claims that plaintiff breached the agreement by filing a lis pendens with the Suffolk County Clerk and argues that plaintiff must reimburse "SCHAMEL" for attorneys fees.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment ( OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1<sup>st</sup> Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2<sup>nd</sup> Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2<sup>nd</sup> Dept., 1981)).

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RPAPL Sec. 901 provides:

“1. A person holding an 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 a sale if it appears that a partition cannot be made without great prejudice to the owners.”

An action for partition of realty is equitable in nature (CHIANG v. CHANG, 137 AD 2D 371, 529 NYS 2d 294 (1<sup>st</sup> Dept., 1988); HEWLETT v. WOOD, 62 NY 75, CROGAN v. LIVINGSTON, 17 NY 218) and is controlled by equitable principles not in conflict with applicable statutory provisions (WORTHING v. COSSAR, 93 AD2d 515, 462 NYS2d 920 (4<sup>th</sup> Dept., 1983); GRODY v. SILVERMAN, 222 App. Div. 526, 226 NYS 468 (1928)). In the absence of an agreement against partition, partition among joint tenants or tenants in common of real property is a matter of right where they do not desire to hold and use the property. (CHEW v. SHELDON, 214 NY 344, 108 NY 522 (1915); SMITH v. SMITH, 116 AD2d 810, 497 NYS 2d 192 (3<sup>rd</sup> Dept., 1986); GASKO v. DEL VENTURA, 96 AD2d 896, 466 NYS 2d 64 (2<sup>nd</sup> Dept., 1983).

In constructing the terms of a contract, the judicial function is to give effect to the parties intentions (MALLAD CONSTRUCTION CORP. v. COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION, 32 NY 2d 285, 344 NYS 2d 925 (1973)). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (SELIGMAN v. MOUNT ARAFAT CEMETERY, INC., 112 AD 2d 928, 492 NYS 2d 445 (2<sup>nd</sup> Dept., 1985)). An agreement should be read as a whole so as to give each section meaning. Where a contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of parties intent or to rules of construction to ascertain the contract's meaning (BETHLEHEM STEEL CO. v. TURNER CONSTRUCTION CO., 2 NY2d 456, 161 NYS 2d 90 (1957)). However where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (See BRAY TERMINALS, INC. v. GRAND UNION CO., 74 AD 2d 965, 425 NYS 2d 886 (1<sup>st</sup> Dept., 1980)).

The relevant, admissible undisputed facts reveal that defendant breached the “Settlement Agreement” by failing to “arrange for Cantor to be released from all liability related to the Fire Island Mortgage” in violation of paragraphs 3.1, 3.2, 3.4 & 3.7. The evidence shows that defendant was obligated to refinance the mortgage to remove “CANTOR” as a mortgagor within 60 days of the sale of the parties condominium. Although the Agreement does not specifically compel the sale of the premises in the event that defendant is unable to secure the release of “CANTOR” by the existing mortgage or refinance the mortgage, the only alternative under the circumstances is to sell the residence based upon “SCHAMEL’s” unconditional obligation to release “CANTOR” from all liability under the mortgage.

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Moreover as an owner of an undivided one-half interest in the parcel, plaintiff has the absolute right to its partition and sale (RPAPL Section 901; see Chew v. Sheldon, 214 NY 344, 108 NY 522 (1915)), notwithstanding the deed held in escrow by plaintiff's counsel which, when recorded, would transfer "CANTOR's" interest as a joint tenant to "SCHAMEL". Plaintiff retains his interest as joint tenant with the right of survivorship until the deed is recorded (see Scartozzi v. Scartozzi, 50 AD3d 662, 856 NYS2d 154 (2<sup>nd</sup> Dept., 2008); Erhal Holding Corp. v. Rusin, 229 AD2d 417, 645 NYS2d 93 (2<sup>nd</sup> Dept., 1996); Gridley v. Home Ins. Co., 226 AD2d 596, 236 NYS2d 295 (1<sup>st</sup> Dept., 1929)). No basis therefore exists to grant defendant's application to remove the lis pendens filed by "CANTOR" and plaintiff's motion for an order granting summary judgment compelling the partition of the premises must therefore be granted.

Section XIII paragraph 13.4 of the "Settlement Agreement" provides

13.4 In the event that one Party brings suit against the other in connection with this Agreement, the prevailing Party shall be entitled to recover reasonable counsel fees and costs from the other Party. A suing Party may prevail by judgment or by the other Party's action causing the result sought in the suit; and a defending Party may prevail by judgment, dismissal, or the other Party's withdrawal of his suit.

Plaintiff is entitled to an award of partial summary judgment for attorneys fees based upon the terms of the above-cited paragraph 13.4. Accordingly it is

**ORDERED** that defendant's cross motion for an order pursuant to CPLR Section 3212 is denied, and it is further

**ORDERED** that plaintiff's motion for an order pursuant to CPLR Section 3212 is granted. Plaintiff is directed submit a proposed order for the appointment of a referee. A hearing with respect to the issue of attorneys fees shall be scheduled upon completion of the partition sale of the premises.

Dated: April 4, 2011

MELVYN TANENBAUM

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J.S.C.