

**Verdi v Verdi**

2013 NY Slip Op 32728(U)

October 22, 2013

Supreme Court, Queens County

Docket Number: 703090/12

Judge: Howard G. Lane

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acquired a 1/3 interest in the Premises from the estate of their late father, Frank Verdi. On or about July 17, 2008, defendant Vincent Verdi purchased William Verdi's interest in the Premises in consideration for \$175,000. In order to secure the funds necessary to purchase William Verdi's interest in the premises, Vincent Verdi and plaintiff mortgaged the premises together. However, plaintiff has not made any payments toward the mortgage.

Based upon Lawrence Verdi's failure to make payments toward the mortgage, Vincent Verdi contends that he owns 2/3 of the Premises, and plaintiff owns 1/3 of the Premises. Plaintiff, on the other hand, contends that he owns a 50% interest in the premises because they both mortgaged the property to secure the funds to purchase William Verdi's interest. Both parties are in agreement about retaining a real estate expert to perform an appraisal of the premises. By the instant motion and cross motion, respectively, defendant seeks to compel plaintiff to disclose the identity of its expert appraiser, and plaintiff seeks summary judgment in his favor for partition and sale of the premises. The motion is opposed by plaintiff, and the cross motion is opposed by defendant.

### **Motion**

Pursuant to CPLR 3101 (d) (1) (I), a party must, upon demand, "identify each person whom the party expects to call as an expert witness at trial" and "disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion". Although the statute mandates that, "[u]pon request," a party "shall" identify the experts it "expects to call as an expert witness at trial" (CPLR 3101[d][1][I] ), it does not specify when a party must disclose its expected trial experts upon receiving a demand (*compare* Fed. Rules Civ. Pro. rule 26[a][2][D] [requiring parties to disclose their experts "at the times and in the sequence that the court orders"] ). As such, a CPLR 3101(d)(1)(I) demand made during discovery "does not require a party to respond to a demand for expert witness information 'at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute' " (*Aversa v Taubes*, 194 AD2d 580, 582, quoting *Lillis v D'Souza*, 174 AD2d 976, 976 [2d Dept 1993]; *see* David D. Siegel, *New York Practice*, § 348A, at 583 [5th ed.] [noting that CPLR 3101(d)(1)(I) "sets forth no particular time for the making of the request, and no particular time for responding to it"] ).

A court has the discretion, however, under its general authority to supervise disclosure, to impose a specific deadline for expert disclosure under CPLR 3101(d)(1)(I),

for example, prior to the filing of a note of issue and certificate of readiness or prior to a motion for summary judgment (*see Mauro v Rosedale Enters.*, 60 AD3d 401 [1<sup>st</sup> Dept 2009]). Moreover, where a trial court sets a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline (*see Rivers v Birnbaum*, 102 AD3d 26 [2d Dept. 2012]; *MacDonald v Leif*, 89 AD3d 995 [2d Dept 2011]; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654 [2d Dept 2010]; *Bomzer v Parke–Davis*, 41 AD3d 522 [2d Dept 2007]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept. 2007]).

In the instant case, the plaintiff failed to provide an adequate explanation for its failure to disclose the names of the real estate expert witness until the eve of trial and otherwise failed to make a showing of good cause for his delay. The defendant herein served a demand pursuant to CPLR 3101 (d) for the names and other pertinent information concerning the expert witness. Therefore, this Court directs that plaintiff provide the name of the real estate appraiser within thirty (30) days of service of this order, with notice of entry.

### **Cross Motion**

Plaintiff's cross motion to partition and sell the property is denied. RPAPL 915 provides that, in an action for partition, an interlocutory judgment shall determine "the right, share, or interest of each party in the property." Where the property was so circumstanced that a partition thereof could not be made without great prejudice to the owners, the interlocutory judgment shall direct that the property be sold at public auction. Otherwise, the interlocutory judgment in favor of the plaintiff shall direct that partition be made between the parties according to their respective right, share, or interest. Here, there has been no interlocutory judgment determining the right, share, or interest of each party in the subject property. While it has been established that the parties are tenants in common to the property, their disagreements as to their respective rights, shares, or interests in this property remain unresolved. Such issues as the rights, shares, or interests of the parties, and whether partition may be had without great prejudice, should be determined and declared by the court, after the referee reports to the court on these issues, before a partition or sale may be directed (*see Goldberger v Rudnicki*, 94 AD3d 1048 [2012]; *Lauriello v Gallotta*, 70 AD3d 1009 [2010]; *Wolfe v Wolfe*, 187 AD2d 628, 629 [1992]; *Grossman v Baker*, 182 AD2d 1119 [1992]; *George v Bridbord*, 113 AD2d 869 [1985]).

In the case at bar, while defendant Verdi counterclaims that he is the 2/3 owner of the Premises, plaintiff alleges that the parties are each ½ owners of the Premises and seeks leave to sell the Premises and divide the proceed equally between himself and

defendant Verdi. As such, summary judgment directing the sale of the Premises is not warranted until an accounting can be held to determine the parties' respective rights, shares and interests in the Premises.

Furthermore, while there is a presumption that tenants-in-common share equally in their common tenancy, such a presumption may be rebutted if the facts show that they hold the tenancy in unequal shares. A court acting in equity may take into account the amounts invested in the property by the respective tenants in determining the shares to which they are entitled (*see Lang v Lang*, 270 AD2d 463, 464 [2000]; *Moran v Thomas*, 280 App Div 1037 [1952]; *Perrin v Harrington*, 146 App Div 292, 296 [1911]). Here, defendant Verdi has rebutted the presumption that the parties are entitled to equal shares of the net proceeds upon the sale of the Premises with evidence that he paid the mortgage and all of the other expenses and carrying charges associated with the Premises (*see McGuire v McGuire*, 93 AD3d 701, 703, leave to appeal denied, 19 NY3d 808 [2012]).

CPLR 6401(a) authorizes the courts to appoint a receiver where there is a danger that property will be "removed from the state, or lost, materially injured or destroyed" (*Quick v Quick*, 69 AD3d 828 [2010]). Plaintiff has not made such a showing. Plaintiff's conclusory allegations that he "fully expects [defendant Verdi] to refuse to cooperate with any orders to sell the property" and that [defendant Verdi] is enjoying the use of the premises as if it were his alone, while I get no benefit from my ownership interest in the property" do not establish the necessity for the conservation of the Premises.

Furthermore, RPAPL 231(1), requires that any sale of the Premises be through public auction (*see e.g. Lauriello v Gallotta, supra*).

Finally, the branch of the cross motion by plaintiff which is to strike defendant's answer based upon defendant Verdi's alleged refusal to allow the Premises to be inspected by plaintiff's appraiser, is denied. A court may strike an answer as a sanction if a defendant "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *see Thompson v Dallas BBQ*, 84 AD3d 1221 [2011]; *Mazza v Seneca*, 72 AD3d 754 [2010]). However, the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (*see Polsky v Tuckman*, 85 AD3d 750 [2011]; *Moray v City of Yonkers*, 76 AD3d 618 [2010]; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654 [2010]; *Dank v Sears Holding Mgt. Corp.*, 69 AD3d 557 [2010]). Here, plaintiff failed to make such a showing. As set forth in the Affirmations of both defendant Verdi's attorney and plaintiff's attorney, the parties agreed that plaintiff's appraiser could inspect the Premises on June 27, 2013. Defendant Verdi simply sought the identity of the appraiser via a

motion to compel.

**Conclusion**

The motion to compel plaintiff to disclose the identity of the appraiser is granted. The Court directs plaintiff to provide the name of the real estate appraiser within thirty (30) days of service of a copy of this order, with notice of entry.

The cross motion by plaintiff Lawrence Verdi for summary judgment in his favor pursuant to CPLR 3212, is denied.

Dated:           October 22, 2013

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**Howard G. Lane, J.S.C.**