Martinez v McTair
2015 NY Slip Op 30380(U)
March 17, 2015
Supreme Court, New York County
Docket Number: 154205/14
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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OBED MARTINEZ,

Plaintiff,

- against -

ANGELA MCTAIR and CARL MCTAIR,

Defendants.

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Index No. 154205/14

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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For defendants:
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Plaintiff moves for an order granting him summary judgment on his claim for partition. Defendants oppose.

I. BACKGROUND

In 2009, plaintiff, defendant Angela McTair's former schoolmate, and defendants, who are spouses, purchased a multiple dwelling building located at 146 West 136th Street in Manhattan as tenants in common, each taking a 50 percent interest. (NYSCEF 10). Plaintiff occupies one unit, defendants and their infant daughter occupy another unit, and the parties rent out the remaining space. Except for an additional $200 per month that plaintiff pays to compensate defendants for certain billing and rent-collection efforts, the parties contribute equally toward building expenses. (NYSCEF 9). Rent income is deposited into a joint bank account, from which they pay expenses. (NYSCEF 16-27).

In or around September 2013, plaintiff asked that defendants purchase his interest in the property. Negotiations ensued, with defendants asking if plaintiff would purchase their interest, or if the parties would sell the property to a third party. No agreement was reached. On or about April 30, 2014, plaintiff commenced this action for partition and sale of the property, with one-half of the proceeds distributable to plaintiff, and the other half distributable to defendants. (NYSCEF 12-14).

II. CONTENTIONS

By affidavit dated July 29, 2014, plaintiff claims that his relationship with defendants has deteriorated to the extent that they communicate only through counsel, and that his "mental health and emotional well being" requires that he cease living with them. He alleges that he wishes to invest in the building, while defendants seek to pay for only dire repairs. (NYSCEF 9). He argues that partition and sale is appropriate given the parties' fundamental disagreement and because physical partition is unfeasible. He relies on the deed (NYSCEF 10) as evidence of his ownership, and right to summary judgment. And, as the parties' contributions and expenses are reflected in the joint bank account statements, plaintiff does not anticipate lengthy accounting. (NYSCEF 28).

In opposition, Angela McTair, by affidavit dated September 3, 2014, denies that the parties disagreed, and alleges having learned of plaintiff's unhappiness in September 2013. The negotiations were unfruitful, Angela alleges, because defendants cannot afford to purchase plaintiff's interest, nor could the property be listed with a realtor, absent any agreement on an appropriate listing price. She contends that her daughter is enrolled in local daycare, belongs to many clubs, that defendants wish to remain in the building and in the neighborhood where their

family now has roots, and that a forced sale would greatly strain her family. Angela also raises the possibility of converting the property into a four-family dwelling, which would increase the value of the property, and increase their profit in the event of sale, thereby allowing defendants to remain in the neighborhood. (NYSCEF 32). Defendants argue that plaintiff is not entitled to summary judgment, as a forced sale would be inequitable, and as there exist material and unsettled questions regarding the value of the property. Moreover, they deny that plaintiff has shown that the property will be sold for the best obtainable price or that there exist fundamental disagreements concerning its maintenance. (NYSCEF 31).

By reply affidavit dated October 8, 2014, plaintiff claims that in 2013, defendants spent an unwarranted amount of time seeking a replacement hot water heater, thereby leaving the property without hot water for two weeks, and that although defendants agreed to install bird spikes, they did so only after plaintiff filed this motion. (NYSCEF 35). Plaintiff also submits defendant Carl McTair's email dated July 2, 2014 (NYSCEF 36), in which he sought from plaintiff notification of future non-emergency improvements, which, in plaintiff's view, reflects defendants' lack of interest in improving the property. According to plaintiff, defendants have made no efforts to convert the property, offering Angela's email dated November 19, 2013 (NYSCEF 37), in which she expresses skepticism about the idea and observes that the associated costs would outweigh any gain from selling a converted property. Plaintiff argues that defendants are not equitably entitled to live in a neighborhood they otherwise cannot afford, and that it is inequitable for him to continue paying half of the mortgage and expenses or for the conversion of a property at which he no longer wishes to reside. (NYSCEF 38).

At oral argument held on January 14, 2015, defendants conceded that plaintiff was

entitled, as a co-owner, to commence a partition action, but in light of alleged triable equitable issues, denied that the motion can be resolved summarily. (NYSCEF 42).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 901(1), 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." With the exception of the partition of real property following a divorce decree, partition is "a matter of right" for one who no longer wishes to own property in common, absent "extreme prejudice to a co-owner." (*Chiang v Chang*, 137 AD2d 371, 373 [1st Dept 1988]; 3 NY Law & Prac of Real Property § 40:3 [2d ed., 2014] ["Partition is a matter of right, however inconvenient, or injurious, it may be.]"). Nevertheless, courts observe that the right to partition is not "absolute"; equitable considerations may be considered. (*See eg.*, *Graffeo v Paciello*, 46 AD3d 613, 614 [2d Dept 2007], *lv denied* 10

NY3d 891 [2008]; *see generally* 24 NY Jur 2d Cotenancy and Partition § 129 ["the right to partition is absolute in the absence of countervailing conditions."]).

A plaintiff establishes her right to summary judgment for partition and sale by demonstrating her ownership and right to possession of the property, and that physical partition cannot be made without great prejudice (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; *Donlon v Diamico*, 33 AD3d 841 [2d Dept 2006]; *Dalmacy v Joseph*, 297 AD2d 329 [2d Dept 2002]). Equitable defenses to partition cannot be based solely on "the adverse consequences which would befall [a] defendant if partition were ordered" (*Manganiello*, 74 AD3d at 668-669) or "the desire to maintain the status quo" (*Ferguson v McLoughlin*, 184 AD2d 294 [1st Dept 1992], *lv denied* 80 NY2d 972).

Here, plaintiff's demonstration of his ownership and right to possess the property, and the undisputed impracticability of physical partition, establishes as a matter of law his partition claim. Defendants' speculation that a sale at this time will diminish their profits, and that as a result, they will no longer be able to reside in their neighborhood does not outweigh plaintiff's right to terminate the co-tenancy. (*See Pando v Tapia*, 79 AD3d 993, 995 [2d Dept 2010] [plaintiff entitled to summary judgment on partition claim by submitting deed establishing ownership and right to possession of property as tenant in common, and by demonstrating that defendant's right to exclusive possession under judgment of divorce had expired]; *Manganiello*, 74 AD3d at 155 [plaintiff established *prima facie* entitlement to judgment by demonstrating his ownership and right to possess property, and that physical partition would greatly prejudice parties; defendant's claim that plaintiff never contributed to purchase of premises, that she solely contributed to property's maintenance, and that she continuously and solely occupied premises

failed to raise triable issue, such equitable considerations would only be relevant when distributing proceeds following sale]; *James v James*, 52 AD3d 474 [2d Dept 2008] [plaintiff established right to summary judgment by establishing his ownership and right to possession of property; defendant's allegation that co-tenancy was created in reliance of plaintiff's promise that he would reconvey interest failed to raise triable issue]; *Graffeo*, 46 AD3d at 614-615 [plaintiff-brother entitled to summary judgment on his partition claim against defendant-sister upon establishing his ownership and right to possession of property and by showing that physical partition could not be made without great prejudice; that deed conveying property to siblings prohibited its alienation without their consent failed to raise triable issues, as the deed did not expressly prohibit partition in the event parties could not reach reasonable agreement]; *Ferguson*, 184 AD2d at 295 [order directing partition and sale upheld; as building did not have multiple utility sources, physical partition "would destroy its marketability and render it virtually inalienable"]).

In *Stressler v Stressler*, the plaintiff sought to partition his former marital residence where his unemancipated son still resided, prompting the court to hold that partition was then inappropriate. (193 AD2d 728 [2d Dept 1993]). Here, by contrast, notwithstanding Angela's speculation, defendants submit no evidence demonstrating why a delayed partition following a hypothetical conversion would yield a more beneficial and equitable outcome for them and their daughter. And, although summary judgment on a partition claim was denied in *Tsoukas v Tsoukas*, the Court identified no facts concerning the equities in the case, and the appealed order is unavailable. (107 AD3d 879, 880 [2d Dept 2013]). Consequently, there is no basis for finding *Tsoukas* apposite. Additionally, *Moses v Moses*, 170 AD 211 (1st Dept 1915) is distinguishable.

The Court in *Ferguson, supra*, moreover, did not hold that partition is only appropriate when parties fundamentally disagree on issues relating to the maintenance of the property. Rather, although such a factor is pertinent in determining whether physical partition is preferable (*see eg, Estate of Steingart v Hoffman*, 33 AD3d 465, 465-66 [1st Dept 2006]), it is irrelevant as no party seeks it here. (*See Donlon*, 33 AD3d at 842 [all plaintiff need show is her right to possession of the property]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partition and for the sale of the property located at West 136th Street, New York, New York, Block 1920, Lot 51, is granted; it is further

ORDERED, that the issue of ascertaining and computing the amount due to plaintiff and defendants upon a sale is referred to a Special Referee, who shall report to this court, and it is further

ORDERED, that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office, who is directed to place this matter on the calendar.

ENTER:

Barbara Jaffe, JSC

DATED: March 17, 2015
New York, New York