SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

NAOMI COLTON,

Plaintiff,

-against-

DEBORAH GIBBER, MARC GIBBER, and DANA STERN GIBBER,

Defendants.

----------X

DECISION AND ORDER

Index No.: 155444/2015
Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. OVERVIEW

This case is one of a number of litigations between siblings relating to estate holdings inherited from their parents. The two sisters, plaintiff Naomi Colton (Colton) and defendant Deborah Gibber (Gibber), are sponsors of a cooperative apartment building located at 171 West 79th Street. Together, they also own the ownership shares to Apartment 82 in the building (Apt 82). The current occupants of Apt 82 are Gibber's son, Marc Gibber (Marc), and daughter-in-law, Dana Stern Gibber (Dana). Marc and Dana pay no rent, although they cover maintenance and assessments due to the cooperative related to Apt 82.

In this case, Colton is suing Gibber for the partition and/or sale of Apt 82, an accounting, and lost rents. Colton also asserts claims against Marc and Dana for use and occupancy and unjust enrichment. On this motion, Colton moves for summary judgment on the claim for partition and sale on the ground that she and Gibber own Apt 82 as tenants in common, and that the Real Property and Proceedings Law allows tenants in common to seek partition and public sale at will. Gibber disputes that Apt 82 was owned as tenants in common, and claims that Gibber and Colton own the apartment as partners. Accordingly, Gibber cross-moves for summary judgment on the first cause of action and, in the alternative, seeks additional discovery pursuant to CPLR 3212(f).

II. BACKGROUND

As these are motions for summary judgment, the facts are taken from the statements of undisputed material facts submitted by the parties, except as noted.

The original sponsors of the cooperative for the building located at 171 West 79th Street (the Co-Op) were Charles K. Goldner (the sisters' father), Nicholas Goldner, and the Estate of Dezso Goldner. It is disputed whether the original sponsors held the property individually or as a partnership. In November 1997, a share certificate was issued to Gibber and Colton transferring ownership of Apt 82 from the sponsor to the sisters ("Shares Certificate"). The Shares Certificate is silent as to whether the apartment was gifted to them as tenants in common, or as partners.

Non-party Daniel Gibber (Daniel, Gibber's son and Marc's brother) and his wife lived in Apt 82 from 1997 through 2007. In 2007, Marc moved into the apartment, and Dana joined him in 2008. Daniel, Marc, and their wives paid the maintenance and assessment fees to the Co-Op, but paid no rent.

III. PARTIES' CONTENTIONS

A. Plaintiff's Arguments

Plaintiff claims that Article 9 of New York Real Property Actions and Proceedings Law ("RPAPL") provides that a joint owner of real property may seek partition, or sale, at will (*see* RPAPL § 901[1]). Partition is available as of right (*see Rosen v Rosen*, 78 AD2d 911 [3rd Dept 1980]). To invoke the right to partition and sale, plaintiff must show ownership of the property, a right to possess the property, and that physically partitioning the property cannot be done without great prejudice (*see Manganiello v Lipman*, 74 AD3d 667 [1st Dept 2010]). As to the last issue, plaintiff states (and defendants do not dispute) that partitioning Apt 82, which has one kitchen and one entrance, would be impracticable (*see Gellenbeck v Whitton*, 2015 WL 888119, 2015 NY Slip Op 30289[U] [Sup Ct, NY County, 2015]). Therefore, plaintiff asks that the apartment be sold and the proceeds split.

B. Defendants' Opposition and Cross-motion

1. The Sponsor Owns Apt 82

Defendants argue that there was never any transfer of Apt 82 from the sponsor to Gibber and Colton, in any configuration. They claim the sponsor is a partnership among Colton, Gibber, and Edith Goldner, and that the sponsor still owns Apt 82 (Opp at 5; although defendants also argue that the original sponsor gifted Apt 82 to Colton and Gibber as partners [*id.* at 14]). According to defendants, Gibber and Colton obtained interests in Apt 82 when they received interests in the

sponsor partnership. Defendants point to various documents which, they claim, support their position:

- The minutes of a June 1997 Co-Op Board Meeting, which state that Apt 82 was "owned by the sponsors is being rennovated and will be occupied by the son of Elliot Gibber" (attached as Exhibit 1 to Gibber Aff)

- A 2014 Shareholder Control Sheet from IRS Form 1065 for the partnership 171 W 79th Street Management Co, which lists the shareholders for various apartments. It names the shareholder for Apt 82 as "171 WEST 79th ST- GIBBER" (attached as Exhibit 2 to Gibber Aff).

- An unsigned Seventeenth Amendment to Cooperative Offering Plan (attached as Exhibit 3 to Gibber Aff), dated approximately February 2001 (while Daniel Gibber was living in Apt 82), which contains a list of "unsold shares" (Exhibit A to Amendment), including Apt 82.

2. Issues of Fact Exist as to a Partnership between Gibber and Colton

Defendants argue that Colton has failed to establish that she and Gibber own Apt 82 as tenants-in-common, and that issues of fact exist sufficient to defeat Colton's motion for summary judgment (*id.* at 12). Defendants contend that no evidence of a tenancy in common exists (*id.* at 12). Defendants maintain that neither the Shares Certificate nor the proprietary lease state there is a tenancy in common. They add that even if the Shares Certificate did, such statement is refuted by the evidence they provide. Quoting *Vick v Albert*, 17 AD3d 255 (1st Dept 2005), defendants assert that "partnership's tax returns, ledgers, and financial statements reflecting the partnership's ownership of the property" overcame the allegations of the plaintiff that the sisters owned the property as tenants in common, when the defendants' tax return reflected her interest in the partnership. Defendants emphasize that, in *Vick*, "the First Department held that the deed to the property identifying the decedent as one of five grantees of title did not conclusively prove that she was a tenant in common, given the documentation and other evidence . . . submitted in opposition" (Opp at 12, citing *Vick,* 17 AD3d at 257).

3. Additional Discovery is Needed

Alternatively, defendants maintain that if their cross-motion for summary judgment is denied, Colton's motion should be denied as well, to allow for additional discovery. Defendants claim that

Colton controlled the family business office and records for a long time, and that while Gibber has had access to the business office pursuant to a recent order by this court in a related action, records are missing. Some files, which had been removed from the office, were recently returned, but not all, especially records related to events at 171 W 79th Street after 1997 (Opp at 11). Gibber suspects that additional documents relating to Apt 82 are missing, as the file relating to that apartment appears smaller than files concerning other apartments (*id.*). Defendants claim that "complete tax records, rental payments, bills, and all personal files held by" Colton are missing (*id.*). Defendants have served document demands and interrogatories, and sought third-party discovery of plaintiff's accountants and attorneys regarding, among other things, the sponsor and how Gibber and Colton obtained their interest in Apt 82 (*id.*).

C. Plaintiff's Reply and Opposition to Cross-motion

1. The Sponsor is Individuals as Tenants-in-Common

Colton replies that, whether Apt 82 is held by Gibber and Colton, or by the sponsor, it is owned by tenants-in-common, as the sponsor is not an entity, but three individuals. Plaintiff emphasizes the distinction between the sponsor and the management company, 171 W. 79th Street Management Co. The latter owns no shares. The Offering Plan names the sponsor as "Charles K. Goldner, Nicholas Goldner and The Estate of Dezso Goldner" (attached as Exhibit 4 to Gibber Aff). Subsequent amendments also list individuals as the holders of unsold shares (Seventeenth Amendment at 1 [naming Edith Goldner, Deborah Gibber, and Naomi Colton]; Seventh Amendment at 2 [naming Charles K. Goldner, Nicholans Goldner, and Edith Goldner as "the Sponsor"]). Plaintiff also provides shares certificates of recent vintage showing that the Estate of Edith Goldner, Colton, and Gibber are tenants-in-common in various other apartments owned by the sponsor (Certificates, attached as Exhibit A to Colton Reply Aff). When apartments were sold, the shares certificates recite that the three tenants in common stated they were participating in the transaction as individuals, as opposed to as a partnership. Further, the purchasers wrote separate checks to each of the three tenants-in-common (*see* Records of Sale of Apt 54, attached as Exhibit B to Colton Reply Aff).

2. The Sponsor Does Not Own Apt 82

Colton contends that the documents provided by the defendants fail to sufficiently rebut the

Shares Certificate as evidence of Gibber and Colton's ownership. While defendants have cited cases in which courts held evidence that property was held by an entity could overcome the characterization of that property as shown on a deed, those courts required proof such as "partnership tax returns, ledgers, and financial statements" (*Vick*, 17 AD3d 255); leases, deposit slips, and mortgage documents (*Gersin v Sloane,* 138 AD2d 569, 570 [2nd Dept 1988]); or partnership agreements (*Altman v Altman* 271 AD 884, 884 [2nd Dept 1946] *affd*, 297 NY 973 [1948]). No such documents are provided here (Reply at 10-11).

Colton points out that while Jeffrey Shavelson, CPA, submitted an affidavit in support of defendants' cross-motion stating that Apt 82 "has always been treated as an asset of the sponsor" (NYSCEF Doc. No. 45, ¶ 4), he subsequently withdrew the affidavit, as he had not examined all of the relevant documents (Second Shavelson Aff, NYSCEF Doc. No. 73, ¶¶ 2-3). Colton also argues that the way Marc and Daniel paid the maintenance supports her position (Reply at 6). Owner-occupants in the building pay their maintenance fees to the Co-Op, while tenants of sponsor-owned apartments paid rent to the management company, which then remitted maintenance fees owed by the unit shareholder to the Co-Op. The checks provided by Marc Gibber (attached as Exhibit 1 to Marc Gibber Aff) show the payment of maintenance fees directly to the Co-Op, consistent with Colton's position that Apt 82 was not a sponsor-owned apartment being rented out, but an owner-occupied apartment (Reply at 6).

Plaintiff also contends that the tax documents upon which the Gibbers rely are not relevant and do not say what the Gibbers claim (Reply at 7, referring to documents attached as Exhibit 2 to Gibber Aff). The 2012 "US Return of Partnership Income" Form1065 is the tax return of 171 W 79th Street Management Company. That company does not own any apartments and the documents in that exhibit do not indicate that it does. The mortgage interest statements, on Form 1098, are produced by the Co-Op to inform the unit owners about mortgage deductions. The fact that such a form was produced for Apt 82 and was sent to the management company is not dispositive of anything (Reply at 7-8). Finally, the Shareholder Control Sheet that lists "171 WEST 79th ST-GIBBER" as the shareholder for Apt 82 is produced by the Cooperative, not the sponsor. It purports to list shareholders, not sponsor-owned units. Plaintiff argues that this document supports her contention that the sponsor does not own Apt 82. She also points to the management company's rent

roll lists, which separate owners from renters. Apt 82 is listed on the list of owners (Reply at 8; Co-op Tenants List, attached as Exhibit C to Colton Reply Aff, Rent Control and Rent Roll Stabilized Lists, attached as Exhibit D to Colton Reply Aff).

Colton also observes that the most current, Twenty-Third Amendment to the Cooperative Offering Plan (attached as Exhibit E to Colton Reply Aff) lists the unsold shares belonging to the sponsor. Apt 82 is not included. Colton claims that the inclusion of Apt 82 on the Seventeenth Amendment was an error, which has now been corrected (Reply at 9). She contends that the Co-Op Board Meeting Minutes from July 17, 1997 (attached as Exhibit 1 to Gibber Aff) are not properly authenticated as Gibber does not appear to have attended that meeting and it fails to specify the building. Colton argues further that the minutes have no probative value, as the minutes pre-date the transfer of the apartment in November of that year (Reply at 10). Accordingly, at the time of the meeting, Apt 82 was properly described as belonging to the sponsor

3. Gibber and Colton own Apt 82 as Tenants In Common

Colton insists that the sponsor (whether individuals or as a partnership) no longer owns Apt 82. She points out that, according to defendants' affidavits, ownership of Apt 82 was transferred from the sponsors to Gibber and Colton in November 1997 (Gibber Aff, ¶ 17; Marc Gibber Aff, ¶ 3; Daniel Gibber Aff, ¶ 3). Therefore, the status of the sponsor is irrelevant to this action.

Colton also relies on the Shares Certificate as powerful evidence that Colton and Gibber own Apt 82 as tenants in common (attached as Exhibit C to Colton Aff). Plaintiff argues that, as the Shares Certificate is "clear and complete on its face," it should be enforced accordingly (*see W.W.W. Assocs v Gianconteri,* 77 NY2d 157, 160 [1990]["clear, complete writings should generally be enforced according to their terms"]). The Shares Certificate lists Gibber and Colton as the shareholders. It does not specify any ownership percentages, partnership, or other entity. New York law presumes a tenancy in common, absent specific language to the contrary (*see In re Sturman*, 222 BR 694, 710 [Bankr SDNY 1998]; *Crawley v Shelby*, 37 AD2d 673 [3d Dept 1971]). Further, Business Corporation Law § 624 (g) provides that a share certificate is "prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding against such corporation or any of its officers, directors or shareholders".

4. No Additional Discovery is Needed

Colton asserts that defendants have not specified any missing documents that are likely to support Gibber's position (Reply at 11). She maintains Gibber has been given full access to the files of the management company (*id.* at 12). As to defendants' argument that the management company's file on Apt 82 is smaller than the files relating to apartments owned by the sponsor, file-size is not indicative of anything. Apt 82 was divested in 1997, so the management company was no longer involved in collecting rent on that apartment (*id.* at 13). Additionally, Gibber's husband, Elliot, is the president and manager of the Cooperative and has had access to all of the Cooperative's documents (Reply at 13).

IV. DISCUSSION

A. Standard on a CPLR 3212 Motion for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez , supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in the light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg.*

Corp., 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. The Sponsors Transferred Apt 82 to Colton and Gibber

Plaintiff has shown that the sponsor transferred Apt 82. The Shares Certificate and the affidavits of Colton, Gibber, Marc, and Daniel all confirm that the sponsor transferred ownership of Apt 82 to Gibber and Colton in November 1997. The fact that Marc and Daniel paid maintenance fees to the Co-Op and made no rent payments to the management company is further proof that Apt 82 is shareholder unit, not a rental unit. The tax documents (attached as Exhibit 2 to Gibber Aff), of the management company create only the vaguest semblance of an issue about how the Co-Op and the management company may have viewed the status of Apt 82. The Seventeenth Amendment to the Cooperative Offering Plan from 2001 (attached as Exhibit 3 to Gibber Aff) lists Apt 82 as an unsold unit belonging to the sponsor, but as the Twenty-Third Amendment (Colton Reply, Ex E) omits that unit. This solitary (subsequently contradicted) reference does not create a disputed issue of material fact sufficient to defeat the instant motion. In any event, Gibber admits that shares in Apt 82 were gifted to her and Colton in November 1997 (Gibber Aff ¶ 17).

C. Gibber and Colton are Tenants-In-Common

The Shares Certificate for Apt 82 lists Gibber and Colton as owners, without reference to any entity or partnership. Under these circumstances, New York law assumes a tenancy in common (*see* EPTL § 6-2.2 [a]; *Estate of Menon v Menon,* 303 AD 2d 622, 641 [2d Dept 2003]). Plaintiff has therefore made a prima facie showing that Gibber and Colton hold Apt 82 as tenants in common. While defendants correctly argue that such a presumption can be overcome, defendants simply have not provided any evidence to support their contention of a Gibber/Colton partnership, other than a conclusory assertion by Gibber (Gibber Aff, ¶ 17). That assertion is inconsistent with the Shares Certificate which shows a transfer to Gibber and Colton and no indicia of a partnership (*id.* at p. 6). Even if there were some evidence to support the claim of a partnership, such evidence would be insufficient as a matter of law because the presumption of a tenancy in common cannot be overcome

except upon clear and convincing evidence (*see id.*). Defendants' evidence falls far short of this standard of proof.

D. No Additional Discovery Needed

As to defendants' request for additional discovery pursuant to CPLR 3212(f) should the court deny their cross-motion for summary of judgment, the request is denied. CPLR 3212 (f) provides:

> "Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Defendants have not specified what documents they lack, or what they anticipate those documents will show. "To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on [a] summary judgment motion" (*Auerback v Bennett,* 47 NY2d 619, 636 [1979]). Defendants' "mere hope" that helpful evidence might be found is not enough to avoid summary judgment (*see Frierson v Concourse Plaza Associates,* 189 AD2d 609, 610 [1st Dept 1993]). Defendants have had access to the Cooperative's documents and to the sponsor's records. Their desire to fish for evidence in a larger pool of documents does not provide a basis to avoid summary judgment. Plaintiff's motion for partial summary judgment shall be granted and defendants' cross motion for summary judgment is denied.

E. Sale is Allowed for Tenants-In-Common as of Right

Pursuant to New York Real Property Law, "[a] person holding and in possession of real property as joint tenant or 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" (NY RP ACT & PRO § 901 [McKinney]). It is undisputed that the apartment cannot be partitioned. Accordingly, the apartment may be sold and the net proceeds distributed.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment as to the first cause of action is GRANTED; and it is further

ORDERED that the cross motion for summary judgment by defendants is DENIED. Within 14 days of the date of this Decision and Order, counsel for the parties shall meet and confer to reach an agreement as to the disposition of Apt 82; and it is further

ORDERED that counsel shall appear at a status conference on May 3, 2016 at 2:30 pm to report on the status of their discussions and to schedule further proceedings in this case. If no

agreement has been reached concerning the disposition of Apt 82, the court will direct the public sale of Apt 82, and appointment of a referee to oversee the process and recommend the distribution of any proceeds. In the event no agreement has been reached, plaintiff's counsel shall prepare a proposed order directing the sale which proposed order shall be served on counsel for defendants not later than at noon on May 2, 2016.

This constitutes the decision and order of the court.

DATED: April 14, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.