

Rosenfeld v Langer

2016 NY Slip Op 30950(U)

May 18, 2016

Supreme Court, Kings County

Docket Number: 506164/2014

Judge: Edgar G. Walker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
MENDEL ROSENFELD and CHAYA ROSENFELD,

Plaintiff,

Hon. Edgar G. Walker
Part 90

-against-

Index No. 506164/2014

PENINAH LANGER, DAVID LANGER, LEAH
SALZBERG and JOSEPH H. SALZBERG,

Defendants.

-----X

The defendants' motion to appoint a temporary receiver is granted. The plaintiffs' motion for partial summary judgment seeking dismissal of the counterclaims asserted by defendants DAVID LANGER and LEAH SALZBERG, (hereinafter referred to as defendant "DL" and defendant "LS," respectively) as well as dismissal of the counterclaims asserted by defendants PENINAH LANGER and JOSEPH H. SALZBERG, (hereinafter referred to as defendant "PL" and defendant "JS," respectively) to the extent that the counterclaims seek relief arising from alleged acts or omissions prior to December 19, 2013 is granted. The motion by the Estate of David Langer to intervene is granted. The plaintiffs' cross motion to compel arbitration and to extend the deadline for filing the note of issue is denied. The defendants' motion for partial summary judgment seeking partition and sale pursuant to RPAPL §901 is granted.

The plaintiffs and defendants PL and JS co-own property located at 1458 East 51st Street in Brooklyn, New York, hereinafter referred to as the "property." The plaintiffs obtained a two-thirds ownership interest in the property in 1981. Harry Langer, the father in-law of defendants PL and JS obtained an ownership interest in the remaining one-third of the property in 1987. By

a deed dated December 19, 2013, Harry Langer transferred his one-third ownership interest in the property to defendants PL and JS. The parties' ownership rights to the property are governed by a 1987 agreement, (hereinafter referred to as "the agreement"). Under the terms of the agreement, the plaintiffs are the fiduciaries and managers of the property and are charged with collecting rental income in the amounts dictated by the agreement, which would be used to pay the monthly mortgage payment, the electricity and heat for the basement apartment, as well as additional property expenses common to the entire property, with any surplus divided bi-annually between the parties in accordance with each party's respective ownership share; two-thirds to the plaintiffs and one-third, initially to Harry Langer and then, after December of 2013, to defendants PL and JS. The agreement further provided that the plaintiffs were obligated to maintain and to disclose all paid invoices and bank statements on a quarterly basis, as well as to provide an accounting on a biannual basis.

On July 7, 2014, the plaintiffs commenced this action seeking, among other things, quiet title to their two-thirds share of the property and a declaration that the 2013 deed is void. The defendants counterclaimed, seeking to quiet title to their one-third share of the property, as well as an accounting, damages for breach of contract and breach of fiduciary duty, and partition and sale of the property.

Initially, the defendants move for the appointment of a temporary receiver, arguing that the plaintiffs failed to keep records of rents collected and expenses incurred, maintain a separate account or provide any accounting of rental income per the terms of the agreement. The defendants further contend that a temporary receiver should be appointed "due to plaintiffs' history of unilateral conduct toward the property", arguing that the plaintiffs never distributed

any portion of rental income, and that the plaintiffs attempted to transfer the defendants' one-third interest to themselves on more than one occasion.

In opposition to the defendants' motion, the plaintiffs argue that "the defendants have not demonstrated the necessary showing of entitlement to this extraordinary and drastic remedy," contending that the defendants have made no showing that the acts or omissions allegedly committed by the plaintiffs placed the property at risk of removal from the state, or of loss, material injury or destruction. The plaintiffs further argue that the defendants' failure to make the required showing of immediate threatened danger to the property is underscored by the fact that the breaches that the defendants accuse the plaintiffs of committing have allegedly been occurring continuously since 1987, and that the defendants fail to explain why now there is an immediate need for the appointment of a receiver, especially in light of the fact that the parties' respective claims are currently in the process of being adjudicated. Finally, the plaintiffs contend that the defendants' claims for alleged fiduciary breaches that occurred beginning in 1987 are well beyond the applicable statute of limitations attaching to defendants' counterclaims.

In reply to the plaintiffs' opposition, and in further support of their motion for the appointment of a receiver, the defendants repeat and reiterate the arguments made in their motion papers and further argue that the plaintiffs do not deny that they kept no records of rents collected or expenses incurred; that the plaintiffs' daughter lives on the top floor of the property without paying rent; that the plaintiffs continue to use the basement without paying any rent; and that the plaintiffs failed to keep a separate account for the income derived from the property. Finally, the defendants contend that their claims are not time barred, arguing that they are suing "*at a minimum* for breaches in the last six years before this action was filed."

In support of their motion for partial summary judgment seeking an order dismissing the counterclaims asserted by the defendants, the plaintiffs argue that the counterclaims asserted by defendants DL and LS should be dismissed on the grounds that these defendants have no ownership interest in the property. The plaintiffs additionally contend that the counterclaims asserted by defendants PL and JS that seek relief arising from alleged acts or omissions prior to December 19, 2013 should be dismissed on the grounds that these defendants had no ownership interest in the property prior to such time.

In opposition to the plaintiffs' motion seeking dismissal of their counterclaims, the defendants argue that defendants DL and LS have standing to proceed with their claims because they are heirs of the prior owner of the one-third share in the property, Harry Langer, and, as such, they have standing for claims to monies and an accounting that post-dates the death of Harry Langer. The defendants further argue that the plaintiffs do not dispute that defendants PL and JS have standing to proceed with their claims from December 19, 2013 and thereafter. Finally, the defendants contend that the Estate of Harry Langer, which is concurrently moving to intervene as a party in this action, has standing and will prosecute all claims prior to Harry Langer's death and as such the counterclaims themselves cannot be dismissed.

In reply to the defendants' opposition to their motion, the plaintiffs repeat and reiterate their arguments that defendants DL and LS have no standing to assert any claims because Harry Langer had already transferred the property to defendants PL and JS prior to his death, and that defendants PL and JS had no ownership interest in the property prior to December 19, 2013 and cannot make claims for anything preceding that date.

In support of the motion to have the Estate of Harry Langer, by its Executrix, (defendant)

LS, intervene as a party in this action, the defendants and the Executrix of Harry Langer's Estate argue that the Estate satisfies the requirements for both mandatory and permissive intervention, and as such, their motion should be granted.

The plaintiffs oppose the defendants' and the Estate of Harry Langer's motion to intervene and cross move to compel arbitration against the Estate of Harry Langer, as well as for an order extending their time to file the Note of Issue. In support of their cross-motion, the plaintiffs argue that by moving to intervene in this action, the Estate of Harry Langer has validated the plaintiff's contention "that the claims in relation to the property and the 1987 Agreement properly belong to the Estate, which should be compelled to return to the arbitration proceeding commenced in 2008." The plaintiffs further argue that the motion to intervene should be denied because "Harry Langer indisputably agreed to submit these claims to arbitration before the Beth Din", and as such, "the Estate is absolutely bound to arbitrate as well."

In opposition and reply, the defendants contend that by forcing the Estate to join this action as a necessary party under RPAPL §1511(1) and CPLR 1000, the plaintiffs have waived their right to compel arbitration. The defendants also point to a prior decision of this Court dated December 16, 2014, which they claim is binding, wherein the Court ruled that, by seeking affirmative relief from the named defendants, the plaintiffs waived their right to arbitration. Finally, the defendants argue that even if the Estate of Harry Langer was required to arbitrate, defendant PL's and defendant JS's claim for partition is separate and distinct from the estate's claims; that the defendants' claims for breaches arising after December 19, 2013 are not subject to arbitration and should proceed; and that the Estate's claims for breaches arising after the date of the arbitration agreement are not subject to arbitration and should proceed.

In support of the defendants' motion for partition and sale of the subject property pursuant to RPAPL §901, the defendants argue that defendant PL and defendant JS, as tenants in common with the plaintiffs, are entitled to partition and sale of the subject property as a matter of right, contending that actual partition alone would cause them great prejudice, and that as such, sale of the property is appropriate. The defendants further argue that the Langer portion of the property, which is one-third of a single three-story home, is not amenable to physical partition, and that in light of the parties' longstanding dispute, and the plaintiffs' failure to manage the property in accordance with their fiduciary duties pursuant to the Agreement, the equities favor partition by sale, and that the sale should be ordered without delay.

In opposition to defendants' motion for partition and sale of the property pursuant to RPAPL §901, the plaintiffs argue that defendants' claim for partition and sale of the property is barred by the 1987 agreement, which provides that "[i]n the event any of the owners wish to sell their interest in the premises, they shall first offer said interest to the other party . . . who shall have the right of first refusal at terms and conditions identical to that of a bona fide third party purchaser." The plaintiffs additionally argue that the equities preclude a partition and sale of the property, contending that it would cause them great prejudice and arguing that the Court should provide an alternative equitable remedy that does not uproot the plaintiffs from their home. Finally, the plaintiffs contend that the defendants' motion for a judgment of immediate partition and sale of the property is premature arguing that an accounting of the income and expenses of the subject property is necessary prior to the entry of a judgment directing partition and sale of the property.

In reply to the plaintiffs' opposition, the defendants reiterate the arguments made in their

motion, and additionally argue that the “First Refusal” provision of the 1987 Agreement is invalid under New York’s statutory rule against remote vesting. The defendants also argue that the plaintiffs do not dispute that the defendants will be greatly prejudiced absent partition and sale because the property is not amenable to actual physical partition. Finally, the defendants contend that even if the Court should order an accounting pursuant to RPAPL §915, said accounting should not delay the Court granting an Order of Partition and Sale.

CPLR 1012(a) addresses intervention as of right and dictates that “[u]pon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” CPLR 1013 addresses intervention by permission and states that:

Upon timely motion, any person may be permitted to intervene in any action . . . when the person’s claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

In this case, the Court finds that the Estate of Harry Langer meets the criteria for both intervention as of right as well as permissive intervention. Dismissal of the counterclaims for damages arising from fiduciary and contractual breaches of the 1987 agreement, which occurred prior to December 19, 2013 would result in the Estate of Harry Langer being both inadequately represented and severely prejudiced. As the Estate of Harry Langer’s claim against the plaintiffs involves similar, if not identical, questions of fact and law as the defendants’ claims against the plaintiffs, the Court grants the defendants’ and the Estate of Harry Langer’s motion to intervene.

It is well established that a party has standing to sue when it has an interest in the claim at

issue in the lawsuit that the law will recognize as a sufficient predicate for deciding the issue at the litigant's request. Caprer v. Nussbaum 36 A.D.3d 176 (2006).

In this case, the defendants one-third ownership share in the property, which is currently owned by defendants PL and JS, was owned by Harry and Hanna Langer from March 25, 1987 until April 26, 2010, and by Harry Langer from April 26, 2010 until December 19, 2013 when it was deeded to defendants PL and JS. At no point did defendants DL or LS have an ownership interest in the property.

The Court finds that defendant PL and defendant JS had no ownership interest in the property prior to December 19, 2013. As such, the portion of the plaintiffs' motion seeking dismissal of counterclaims asserted by defendants DL and LS is granted, and the portion of the plaintiffs' motion seeking dismissal of the counterclaims asserted by defendants PL and JS is granted to the extent that only the counterclaims seeking relief arising from alleged acts or omissions prior to December 19, 2013, are dismissed.

It is well settled that the commencement of an action at law involving arbitrable issues constitutes a waiver of the right to arbitrate. Hawthorne Dev. Associates v. Gribin, 128 A.D.2d 874 (2'd Dept. 1987). In this case, the plaintiffs commenced this action partially based on claims that arose before December 19, 2013 prior to the death of Harry Langer. As such, the Court finds that in commencing this action, the plaintiffs waived their right to arbitration. The Court additionally notes that, by Order dated December 4, 2014, this Court previously determined that "by bringing the instant action, plaintiffs have waived their right to arbitration."

New York's rule against perpetuities is governed by the Estates Powers and Trusts Law. EPTL §9-1.1(a)(2), sets forth the suspension of alienation rule and deems void any estate in

which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years; EPTL §9-1.1(b) states that “[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.”

New York’s rule against perpetuities preventing remote vesting applies to options to buy and to right of first refusal provisions. However, said provisions are permissible providing that they do not violate the rule against perpetuities. Morrison v. Piper, 77 N.Y.2d 165 (1990).

In this case, the Court finds that the right of first refusal provision in the 1987 agreement violates the New York State rule against perpetuities, EPTL §9-1.1(b) because the agreement contains no temporal limitation at all. As such, no right of first refusal exists or is available to the plaintiffs.

RPAPL §901, which governs by whom actions for partition are maintainable, specifically states that:

[a] person holding and 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 sale if it appears that a partition cannot be made without great prejudice to the owners.

See Donlon v. Diamico, 33 A.D.3d 841 (2'd Dept. 2006); RPAPL §901. Actual possession of the property is not a prerequisite and that constructive possession is sufficient for the maintenance of the action, and that the action may be brought by one having an interest by ownership in the fee. Deegan v. Deegan, 247 A.D. 340 (2'd Dept. 1936). The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL §901, the remedy is always subject to the equities between the parties. Goldberger v.

Rudnicki, 94 A.D.3d 1048 (2'd Dept. 2012). Moreover, in a partition suit, it is within the discretion of the court before which the partition action is pending to direct a sale or actual partition of the premises involved. Brooks v. Davey, 109 N.Y. 495 (1888).

In assessing whether physical partition of the property is feasible, or if an order for partition and sale is required, the courts consider the resulting prejudice to the parties, if any, as well as the practicability of physical partition. Ferguson c. McLoughlin, 184 A.D.2d 294 (1st Dep't 1992); *see also*, Snyder Fulton Street, LLC v. Fulton Interest, LLC, 57 A.D.3d 511 (2'd Dept. 2008). When making this assessment, courts have also considered the parties' cooperation with one another. Augustus v. Mahadeo, 168 A.D.2d 658 (2'd Dept. 1990), "[W]hile a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties." Arata v. Behling, 57 A.D.3d 925 (2'd Dept. 2008). The fact that adverse consequences may befall a party as a result of a partition is insufficient to tip the equities in that party's favor.

In assessing the practicability of physical partition of the property in dispute, the Court finds that the subject property is not amenable to a physical partition. Considering the parties' contentious history, as well as the plaintiffs' incessant failure to keep records and comply with their fiduciary duties under the 1987 agreement, the fact that the plaintiffs currently reside at the property does not tip the equities in the plaintiffs' favor.

Finally, as there were no records kept by plaintiffs, the Court finds no reason to delay the appointment of a temporary receiver or the partition and sale of the property. As such, the defendants' motion for partial summary judgment seeking partition and sale pursuant to RPAPL §901 is granted, as is the defendants' motion to appoint a temporary receiver. The portion of the

plaintiffs' cross motion seeking an extension of time to file the note of issue is denied as moot.

This constitutes the Decision and Order of the Court.

Dated : 5-18-16



Hon. Edgar G. Walker, J.S.C.

FILED

MAY 23 2016

KINGS COUNTY CLERK'S OFFICE