Hitech Homes, LLC v Burke
2016 NY Slip Op 31308(U)
July 12, 2016
Supreme Court, New York County
Docket Number: 160469/2015
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

HITECH HOMES, LLC,
Plaintiff,

-against-

TANYA J. BURKE and YON-ALLYN STYLES,
Defendants.

INDEX NO. 160469/2015
MOTION DATE 05/18/2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-7
Replying Affidavits	8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff's motion for summary judgment is granted.

The instant action was commenced on October 13, 2015 for the judicial sale and conveyance of the premises 217 West 123rd St., New York, New York (herein "the Premises"). Plaintiff obtained an undivided two-thirds interest in the Premises by Deed dated September 25, 2015 (Mot. Exh. 3), after obtaining this interest by way of a specific performance action, New York County Index No. 159820-2013, commenced against the former holders of the two-third interests (Plaintiff's predecessor-in-interest). This specific performance on the contract to sell the Premises was granted in accordance with an Order in a related action between Plaintiff's predecessor-in-interest and the Defendants in the instant action, New York County Index No. 100986/2012. (Aff. In Opp. Exh. A).

Tanya J. Burke and Yon-Allyn Styles (herein collectively "Defendants") obtained an undivided one-third interest in the Premises by Deed dated May 14, 2007. (Mot. Exh. 4). Together, Plaintiff and the Defendants are tenants-in-common. Neither of the parties occupy the Premises, and the Premises is boarded up and has not been in use for some time. (Mot. Exh. labeled "Photos").

Plaintiff now moves for an Order granting it summary judgment on the Complaint, directing a judicial sale of the Premises with the money arising from the sale divided and paid to the parties according to the interest they hold in the Premises, and further that upon the sale and conveyance of the Premises to the purchaser, that the parties be barred from all right, title and interest in the possession, reversion, remainder or otherwise in the Premises. Defendants oppose the motion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff argues that the Premises is incapable of physical partition without resulting in great prejudice to the parties. Further, Plaintiff states: (1) that the Premises is in a state of disrepair as a result of Plaintiff's predecessor-in-interest and the Defendants failing to care for the property, (2) that the predecessor-in-interest and the Defendants owe real estate taxes and have defaulted on an agreement with New York City for the payment of tax arrearages, and (3) that it is only a three story building with a basement, and is approximately seventeen feet wide and about fifty feet long with the entire lot being only about twenty-five feet wide and about one hundred feet long. Plaintiff also claims that it has repeatedly attempted negotiations with the Defendants as to the future operation of the Premises to no avail, and that the Defendants have not asserted any defenses to the instant Complaint; that they are owed income and/or expenses, and that an accounting is needed prior to judicial partition.

In opposition, Defendants contend that Plaintiff has not satisfied its burden for summary judgment because there remain material issues of fact. First, Defendants state that Plaintiff made no attempts at a real negotiation about how the Premises would be maintained, but Defendants are still ready and willing to negotiate, and would also be willing to enter into mediation. Second, Defendants argue that partition is subject to the equities of the parties, which was not set forth by Plaintiff's summary judgment motion, and which Defendants request discovery be allowed to go forward in order to weigh such equities. Third, Defendants contend that, although Plaintiff asserts, without any proof, that a physical partition could not be done without prejudice to the parties, physical partition may be possible because there are lots in Manhattan which are far smaller than the Premises in issue. Fourth, Defendants argue that physical partition is not necessary because since both parties want to develop the property, this can be done by replacing the existing building, and developing the property jointly with costs and rental incomes being proportionately allocated between the parties. Fifth, Defendants refute Plaintiff's assertion that the Premises are dangerous, and that either way the building condition is irrelevant because the building will be torn down and re-developed anyway. Ultimately, the Defendants want to develop the property together with the Plaintiff, and be able to maintain one unit within the building for themselves because the Premises has been in their family for over sixty years.

Defendants request, though not by cross-motion, that both parties appear before a court appointed mediator and an accounting take place in order to determine if Plaintiff is obligated to pay the outstanding real estate taxes and ECB violations for which it received credit when it closed on the property in September of 2015, or in the alternative the Court order that discovery commence to determine whether the equities would be balanced with a partition and sale. Plaintiff Styles sets forth in the Affidavit in Opposition that the Premises are boarded up to keep out illegal squatters, that the two violations received were because of people illegally dumping trash on the property, and that the Defendants have paid most of the expenses, including real estate taxes since they obtained ownership in 2007, totaling over $105,000.00. Further, Defendant Styles states that upon the sale of the two-third's interest to Plaintiff, $50,389.86 was received by the Plaintiff as a credit at the closing to pay any remaining debt to the New York City Department of Finance for unpaid taxes. Defendant Styles contends that in the action, Index No. 100986/2012, the Court ordered Plaintiff's predecessor-in-interest to place $70,000.00 in escrow until a referee determined what was owed to the Defendants for maintaining the Premises.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

RPAPL §901(1) 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 a sale if it appears that a partition cannot be made without great prejudice to the owners."

Generally, "one who holds an interest in real property as a tenant in common may seek physical partition of the property, or a partition and sale thereof unless it appears that physical partition alone would greatly prejudice the owners of the premises." (Ferguson v. McLoughlin, 184 A.D.2d 294, 584 N.Y.S.2d 816 [1st Dept. 1992], Bufogle v. Greek, 152 A.D.2d 527, 543 N.Y.S.2d 152 [2nd Dept. 1989]). A "statutory right of partition is not absolute and may be precluded by the equities presented in a given case..." (Ferguson, Supra).

In Ferguson, the defendant fought for a physical partition rather than sale of the property, however, the court held that physical partition would result in great prejudice to the owners because the premises was only a "five-story building situated on a small parcel of land that was 18 feet 11 inches wide and 62 feet 6 inches deep, the building had one address, one Consolidated Edison electrical and gas service main, one sewer service, one roof, one basement, one fire escape, one main water supply, one real estate tax liability, one common hallway, one stairway, one boiler and heating system, and one hot water tank..." (See Ferguson).

Here, due to the condition of the Premises (as evidenced by the photographs presented by plaintiff), partition would be virtually impossible. Plaintiff provides proof of the customer registration form for the water and sewer with the Department of Environmental Protection. The Premises are listed by the address, with no reference to there being more than one source for water or sewer service. Nor is the lot size big enough to accommodate both parties if the building was to be torn down and the lot divided. Defendants provide no evidence to the contrary that physical partition is warranted instead of a sale. In support of its opposition, Defendants provide only an affidavit by Defendant Styles, and a copy of the Order under Index No. 100986/2012 that directed the sale of the Premises to Plaintiff. Defendant Styles contends that a preliminary settlement has been reached in that action, with the majority of the settlement to be used to pay the outstanding real estate taxes due. The Order provided for review is the initial order directing $50,000.00 of the sale proceeds to be held in escrow until a determination is made as to the expenses incurred in maintaining the property and how much each owner should pay(i.e. how much would be due from the two-thirds predecessors-in-interest and the Defendants, who are also the Defendants in

the instant action). The results in that underlying action, however, have no bearing on the instant action.

"Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property." (Manganiello v. Lipman, 74 A.D.3d 667, 905 N.Y.S.2d 153 [1st Dept. 2010]). A "[p]laintiff, by demonstrating his ownership, his right to possession of the subject [property], and that physical partition alone could not be made without great prejudice, [establishes] his prima facie entitlement to summary judgment on his claim for partition and sale of the instant property." (Id.) A defendant merely asserting that the plaintiff has not contributed to the property's maintenance and upkeep fails to establish that the equities favor a dismissal of the complaint for partition and sale of the premises. (Id., citing Ferguson, Supra, [equities did not warrant denial of partition action when defense was nothing more than the adverse consequences which would befall defendant if partition was ordered]).

Defendants do not set forth how they would be prejudiced by the sale of the Premises or how the equities tips in their favor. Defendant only argues that discovery is needed in order to establish such equities. This argument is unavailing. Further, Defendants provide only a mere assertion that Plaintiff has not contributed to the Premises' upkeep, and this does not establish equities which preclude a partition and sale. Plaintiff has established his ownership and right to possession as a tenant-in-common with a two-thirds ownership interest, and has demonstrated that physical partition would only greatly prejudice both parties. Defendants provide no evidence to the contrary to refute this. Furthermore, there does not have to be a showing "that the relationship between the parties was acrimonious, that they were in deadlock, or that the subject property was mismanaged" because "'as a matter of right [a party can seek] partition and sale when he or she no longer wishes to jointly use or own the property.'" (Mark Family Realty, LLC v. Sanko, 136 A.D.3d 500, 25 N.Y.S.3d 164 [1st Dept. 2016], citing Manganiello, Supra.) Therefore, Plaintiff has a statutory right to partition or partition and sale of the property.

Accordingly, it is ORDERED, that Plaintiff's motion for summary judgment against Defendants Tanya J. Burke and Yon-Allyn Styles for partition and sale is granted, and it is further,

ORDERED, that a sale of the Premises located at 217 West 123rd Street, New York, New York, is Ordered, and it is further,

ORDERED, that the proceeds from the sale of the Premises be divided and paid to the parties according to that party's interest, two-thirds to the Plaintiff and one-third to the Defendants, and it is further,

ORDERED, that any outstanding debts associated with the Premises be divided and paid for from the sale proceeds by each party according to that party's interest, two-thirds of the debt to be paid by Plaintiff, and one-third of the debt to be paid by Defendants.

Enter: **MANUEL J. MENDEZ**
J.S.C.

Dated: **July 12, 2016**

MANUEL J. MENDEZ
J.S.C.

Check one: **X** **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**