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| <b>Kobyleckyj v Kobyleckyj</b>                                                                                                                                                                                                                                   |
| 2016 NY Slip Op 31827(U)                                                                                                                                                                                                                                         |
| September 28, 2016                                                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 153740/2015                                                                                                                                                                                                                                       |
| Judge: Cynthia S. Kern                                                                                                                                                                                                                                           |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
MICHAEL KOBYLECKYJ,

Plaintiff,

**AMENDED DECISION/ORDER**  
**Index No. 153740/2015**

-against-

STEPHAN KOBYLECKYJ, LISA KOBYLECKYJ,  
AZBOK, LLC

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiff Michael Kobyleckyj commenced the instant action arising out of certain real property located in New York City. Plaintiff now moves for an Order pursuant to (1) CPLR § 3212(e) granting him partial summary judgment on his first and second causes of action; and (2) CPLR § 3211(b) dismissing the affirmative defenses and counterclaims asserted by defendants Stephan Kobyleckyj, Lisa Kobyleckyj (the “individual defendants”) and Azbok, LLC (“Azbok”) (hereinafter collectively referred to as “defendants”). For the reasons set forth below, plaintiff’s motion is granted in part and denied in part.

The relevant facts are as follows. This action arises out of real property located at 101 First Avenue, New York, New York (the “property”), a mixed-use five story building with ground-floor commercial space and four residential apartments. Plaintiff is a tenant in common of the property, holding a thirty-four percent undivided interest therein together with his siblings, defendant Stephan Kobyleckyj, who owns a thirty-two percent undivided interest and defendant Lisa Kobyleckyj, who owns the remaining thirty-four percent undivided interest. Defendant Azbok is a company formed by defendants for the purpose of managing the property of which plaintiff is not a member.

Plaintiff alleges that beginning in early 2012 and without plaintiff's consent, defendants began collecting all of the rents of the property and paying its expenses; that defendants mismanaged the property by overpaying for certain expenses of maintaining, repairing, renovating and operating the property; that defendants failed to timely renovate and re-let vacant units in the building resulting in a substantial loss of revenue; and that defendants have used the proceeds from the property, without plaintiff's consent, to pay their own personal expenses completely unrelated to the maintenance and operation of the property. Plaintiff further alleges that defendants have failed and refused to provide plaintiff with a complete accounting so that he is unable to determine the exact amount that has allegedly been misappropriated by defendants but he estimates that defendants have misappropriated funds in excess of \$100,000.00. Plaintiff also alleges that beginning in 2013, defendants have made substantial distributions to themselves and to their late mother and have completely excluded plaintiff who last received a distribution from the funds collected from the property in 2012.

Thus, in or around 2015, plaintiff commenced the instant action asserting claims for partition and sale of the property pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 901, an accounting, violation of RPAPL § 817, breach of fiduciary duty and injunctive relief. Defendants then interposed an answer in which they asserted four affirmative defenses for unclean hands, waiver, statute of limitations and failure to state a cause of action and two counterclaims for breach of fiduciary duty and waste. Plaintiff now moves for summary judgment on his causes of action for partition and sale of the property and for an accounting and also moves to dismiss defendants' affirmative defenses and counterclaims.

The court first turns to plaintiff's motion for summary judgment on his first cause of action for partition and sale of the property. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden

shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

“Pursuant to both 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, 668 (1<sup>st</sup> Dept 2010). To make a prima facie showing of entitlement to summary judgment on a claim for partition and sale, a plaintiff must demonstrate “his ownership, his right to possession of the subject [property], and that physical partition alone could not be made without great prejudice.” *Id.* at 668-69.

In the present case, plaintiff has established his *prima facie* right to summary judgment on his first cause of action for partition and sale of the property. Initially, it is undisputed by the parties that plaintiff co-owns the property. Further, plaintiff has demonstrated that physical partition alone could not be made without great prejudice as the property is a mixed-use building, which prejudice is not disputed by the defendants. Additionally, plaintiff has affirmed that he no longer wishes to jointly own the property with defendants, which is a sufficient basis for seeking partition and sale of the property.

In opposition, defendants have failed to raise a triable issue of fact sufficient to defeat plaintiff’s motion for summary judgment on his first cause of action for partition and sale of the property. Defendants’ assertion that plaintiff’s motion for summary judgment must be denied because he has failed to demonstrate his ouster from the property by defendants is without merit as there is no requirement that plaintiff demonstrate ouster from the property in order to be entitled to partition and sale of the property he jointly owns with defendants.

Additionally, defendants’ assertion that plaintiff’s motion for summary judgment must be denied on the ground that plaintiff has totally avoided the property, has refused to participate in any capacity with the management of the property and defendant Azbok and has instead decided to leave his siblings with all of the work, constituting a breach of his fiduciary duty, is also without merit. Even if defendants’ assertions are correct and plaintiff has indeed left defendants with the work of maintaining and operating the property,

defendants have not established nor have they provided any case law for the proposition that such behavior precludes plaintiff from seeking partition and sale of the property.

Finally, defendants' assertion that plaintiff's motion for summary judgment must be denied on the ground that should a partition and sale be granted, the property would be sold at a discounted price at public auction resulting in a substantial loss to the parties' interests is without merit as such assertion, even if true, is not a basis for denying partition and sale. Further, although RPAPL § 915 directs that a property which shall be partitioned and sold shall be sold at public auction, the parties may stipulate to an alternate means of selling the property.

The court next turns to plaintiff's motion for summary judgment on his second cause of action for an accounting. It is well-settled "that an accounting is a necessary incident of a partition action." *Wong v. Chi-Kay Cheung*, 46 A.D.3d 1322, 1323 (3d Dept 2007). Indeed, "[p]rior to the entry of an interlocutory judgment directing the sale of the subject property, an accounting must be made of the income and expenses of the property, including but not limited to insurance costs, taxes, rents, and maintenance costs." *Donlon v. Diamico*, 33 A.D.3d 841 (2d Dept 2006).

In the instant action, plaintiff has established his *prima facie* right to summary judgment on his second cause of action for an accounting as this court has granted plaintiff's motion for summary judgment on his claim for partition and sale of the property and therefore, he is also entitled to an accounting from defendants of all income and expenses of the property prior to the entry of a judgment directing the sale of the property.

To the extent defendants assert that plaintiff's motion for summary judgment on his second cause of action must be denied as moot on the ground that "the parties currently have competing settlement offers and are very close to resolving the matter in its entirety" and that "the parties already have an understanding with regard to an accounting which is presently underway," such assertion is without merit. Plaintiff has affirmed in reply that he has yet to receive a full accounting from defendants of all income and expenses of the property and he is entitled to same. Further, any settlement discussions the parties may be conducting

are immaterial as no settlement has yet been entered in this case and the parties have not sought an adjournment of the motion based on such settlement discussions.

The court next turns to plaintiff's motion to dismiss defendants' affirmative defenses. Pursuant to CPLR § 3211(b), "[a] party may move for judgement dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. *See Robbins v. Grownney*, 229 A.D.2d 356, 358 (1<sup>st</sup> Dept 1996).

As an initial matter, plaintiff's motion to dismiss defendants' first affirmative defense of unclean hands and second affirmative defense of waiver is granted as the court finds that such defenses consist of nothing more than bare legal conclusions without supporting facts. Indeed, the first affirmative defense merely asserts "that Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands as Plaintiff is not free of inequitable conduct relative to the controversy" without providing any facts to support such assertion while the second affirmative defense asserts only "that Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver."

Additionally, plaintiff's motion to dismiss defendants' third affirmative defense of statute of limitations is also granted as the court finds that such defense is merely conclusory. The First Department has held that in pleading a statute of limitations defense, a defendant at the very least must "state the applicable period of limitations" in order to comply with the specificity requirement of CPLR § 3013. *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 83 (1<sup>st</sup> Dept 2015). Here, defendants' third affirmative defense merely asserts "that Plaintiff's claims in the Verified Complaint related to an alleged distribution of \$1,250.00 due and owing for the year 2011 are barred by the statute of limitations" but it fails to state the applicable period of limitations or explain why such claim is time-barred.

Additionally, plaintiff's motion to dismiss defendants' fourth affirmative defense of failure to state a cause of action is granted. The First Department has made clear that "such a defense may be dismissed only if all the other affirmative defenses are found to be legally insufficient." *Raine v. Allied Artists Prods.*, 63 A.D.2d 914, 915 (1<sup>st</sup> Dept 1978). *See also Bernstein v. Freudman*, 136 A.D.2d 490, 492-93 (1<sup>st</sup> Dept 1988) ("The first affirmative defense states that each cause of action fails to set forth facts sufficient to

constitute a cause of action. This is mere surplusage but, because [another affirmative defense remains], that affirmative defense can also remain.”) As this court has dismissed the remaining affirmative defenses, defendants’ fourth affirmative defense of failure to state a cause of action is also dismissed.

The court next turns to plaintiff’s motion to dismiss defendants’ counterclaims. On a motion addressed to the sufficiency of [a pleading], the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a [pleading] should not be dismissed on a pleading motion so long as, when [the] allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

As an initial matter, plaintiff’s motion to dismiss the first counterclaim for breach of fiduciary duty pursuant to CPLR § 3211(a)(7) on the ground that it fails to state a cause of action, to the extent it is asserted by defendant Azbok, is granted as there is no fiduciary relationship between plaintiff and Azbok, the company formed by the individual defendants in order to manage the property, and defendants do not dispute such fact.

However, plaintiff’s motion to dismiss the first counterclaim for breach of fiduciary duty pursuant to CPLR § 3211(a)(7) on the ground that it fails to state a cause of action, to the extent it is asserted by the individual defendants, is denied. “To state a claim for breach of fiduciary duty, [a party] must allege that (1) [it was] owed [] a fiduciary duty, (2) [the other party] committed misconduct, and (3) [it] suffered damages caused by that misconduct.” *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-70 (1<sup>st</sup> Dept 2011). Here, the court finds that defendants’ first counterclaim sufficiently states a claim for breach of fiduciary duty as it alleges that defendants were owed a fiduciary duty by plaintiff; that plaintiff committed misconduct; and that defendants sustained damages as a result of plaintiff’s misconduct. Specifically, the

counterclaim alleges that plaintiff, as a tenant in common with defendants with respect to the property, breached the fiduciary duty he owed to defendants by failing to participate in Azbok with respect to the management of the property and failing to respond to defendants' inquiries regarding his participation in Azbok with respect to the management of the property and that as a result of said breach, defendants have been unable to obtain refinancing for the property and have been unable to make renovations to the property so that it is not providing the amount of income it is capable of providing. To the extent plaintiff asserts that the counterclaim for breach of fiduciary duty must be dismissed because the misconduct alleged by defendants is not sufficient to constitute a breach of fiduciary duty, such assertion is without merit as plaintiff has failed to cite to any authority for such proposition.

Additionally, plaintiff's motion to dismiss defendants' first counterclaim for breach of fiduciary duty pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations, to the extent it is asserted by the individual defendants, is also denied. "A [party] who seeks dismissal of a [claim] pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired." *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dept 2007). It is well-settled that "[w]here the remedy sought [for a breach of fiduciary duty claim] is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009). Further, a breach of fiduciary duty claim "accrues as soon as 'the claim becomes enforceable, i.e., when all elements of the [claim] can be truthfully alleged in a complaint.'" *Id.* at 140, quoting *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). "As with other torts in which damage is an essential element, the claim [for breach of fiduciary duty] 'is not enforceable until damages are sustained.'" *Id.* at 140, quoting *Kronos, Inc.*, 81 N.Y.2d at 94.

Here, plaintiff's motion to dismiss defendants' first counterclaim for breach of fiduciary duty pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations, to the extent it is asserted by the individual defendants, must be denied as plaintiff has failed to establish that such claim is time-barred. It is undisputed that defendants seek only monetary damages as a remedy for their breach of



fiduciary duty claim. Thus, the court shall apply a three-year statute of limitations to said claim. However, upon reviewing the allegations asserted in the counterclaim for breach of fiduciary duty, the court is unable to determine if the claim is time-barred as there is no allegation as to when the alleged damages were actually sustained by defendants. The counterclaim asserts that as a result of plaintiff's alleged breach of his fiduciary duty, defendants were damaged in that they have been unable to obtain refinancing for the property and have been unable to make renovations to the property in order to obtain a higher amount of income from the property. However, the counterclaim fails to allege when such damages were sustained as it fails to assert when defendants attempted to obtain refinancing for the property or when they attempted to make renovations to the property.

Plaintiff's motion to dismiss defendants' second counterclaim alleging a claim for waste pursuant to CPLR § 3211(a)(7) on the ground that it fails to state a cause of action is granted. To sufficiently plead a claim for waste, a party must allege "destruction, misuse, alteration, or neglect of premises by one lawfully in possession thereof to the prejudice of the...interest therein of another." *Gilman v. Abagnale*, 235 A.D.2d 989, 991 (3d Dept 1997). It is well-settled that "[p]ermitting property to remain in disrepair constitutes waste" and that "disrepair" refers to "damage to the structure" itself. *Staropoli v. Staropoli*, 180 A.D.2d 727, 727 (2d Dept 1992). Here, the court finds that defendants' second counterclaim fails to sufficiently plead a claim for waste. The counterclaim alleges that plaintiff committed acts of waste with respect to the property in that he "fail[ed] to participate in Azbok, LLC with respect to the management of the property" and "further fail[ed] to even respond to [the individual defendants'] inquiries regarding his participation in Azbok, LLC with respect to the management of the property" and that such acts of waste prevented defendants from obtaining refinancing for the property and prevented defendants from making certain renovations to the property. However, the counterclaim fails to allege that plaintiff's alleged conduct destroyed, misused, altered or neglected the property or that plaintiff's conduct caused the property to remain in structural disrepair.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on his first cause of action for partition and sale of the property is granted; and it is further

ORDERED that plaintiff's motion for summary judgment on his second cause of action for an accounting is granted; and it is further

ORDERED that plaintiff's motion to dismiss defendants' four affirmative defenses is granted; and it is further

ORDERED that plaintiff's motion to dismiss the first counterclaim for breach of fiduciary duty to the extent it is asserted by defendant Azbok is granted; and it is further

ORDERED that plaintiff's motion to dismiss the first counterclaim for breach of fiduciary duty to the extent it is asserted by the individual defendants is denied; and it is further

ORDERED that plaintiff's motion to dismiss defendants' second counterclaim for waste is granted.

A referee shall be appointed prior to the sale of the property to hear and report with respect to the parties' respective rights, shares, and interests pursuant to RPAPL § 911, to hear and report whether there is any creditor not a party who has a lien on the undivided share or interest of any party pursuant to RPAPL § 913 and to make an accounting as to income received and expenses incurred, including taxes paid, relative to the maintenance and operation of the property. Settle order with respect to the appointment of said referee.

DATE:

9/28/16

  
KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN  
J.S.C.