

Lane v Tyson
2017 NY Slip Op 32628(U)
December 12, 2017
Supreme Court, New York County
Docket Number: 155708/2014
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

TERRY LANE,

Plaintiff,

-against-

LYDELL TYSON

Defendant.

Index No.: 155708/2014
DECISION/ORDER
Motion Seq. No. 003,004

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff’s motion for an order to direct the referee (Seq. 003) and for an order to stay the referee (Seq. 004) and defendant’s cross-motion for an order of reference under RPAPL 911, 913, and CPLR 4311 (Seq. 003).

Papers	NYSCEF Documents Numbered
Plaintiff’s Notice of Motion (Sequence 003).....	37
Plaintiff’s Affidavit in Support of Motion.....	38-39
Defendant’s Notice of Cross-Motion.....	40
Defendant’s Affidavit in Support of Cross-Motion.....	41-42
Plaintiff’s Affidavit in Reply and Limited Opposition to Cross-Motion.....	43
Plaintiff’s Order to Show Cause (Sequence 004)	45, 48
Plaintiff’s Affidavit in Support of Motion (Sequence 004)	46, 50

Gerald Lebovits, J.

Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiff, Terry Lane, and defendant, Lydell Tyson, entered into a loan agreement to buy a New York City apartment. They became tenants in common of the apartment with equal shares. The parties signed a contract agreeing to the following:

4. “The Obligor shall repay the sum of sixty thousand dollars (\$60,000.00) plus interest in monthly installments
The Obligor shall have the benefit of a fifteen thousand gift at the time of full payment of the amount stated above or at the time he exercises his option herein to buy the Obligee interest if full.

* * * *

“12. LEGAL FEES: Obligor shall pay any and all legal fees of the obligee to enforce his rights hereunder.” (Plaintiff’s Affirmation in Support, Exhibit C.)

After defendant failed to satisfy his payment obligation under their contract, plaintiff filed a partition action on or about June 2014. In an order dated September 25, 2014, The Hon. Geoffrey Wright granted on the partition action and directed plaintiff to settle the judgment. Judge Wright granted the final judgment of partition on November 21, 2014. A referee, Daphne McKenzie, was assigned to sell the apartment. The apartment was sold on April 12, 2017. The referee is holding in an escrow account the remaining funds from the sale. The referee is also holding an additional sum in escrow pursuant to an agreement between the parties that they signed at the closing of the sale. The agreement relates to the judgment and liens against plaintiff.

Plaintiff moves for an order to direct the referee to distribute the proceeds from the sale of the apartment (motion seq. 003). Defendant cross-moves for an order of reference and to schedule a status conference. On June 30, 2017, referee McKenzie informed plaintiff that she would release the funds remaining in the escrow accounts. Plaintiff then filed an order to show cause for an order to stay the referee from releasing the funds from the escrow account (motion seq. 004.)

The motions and cross-motion are granted to the extent provided below.

In support of his motion, plaintiff argues that his share of the proceeds from sale of the apartment should be increased as follows. Plaintiff argues that the starting point to distribute the proceeds should be an equal division between plaintiff and defendant. Plaintiff contends that his share should increase from \$147,588.49 (half the proceeds from the sale of the apartment) to \$180,391.95. Plaintiff explains that his share should increase because of the \$25,723.66 loan amount that defendant has not paid, \$8137.00 in unpaid maintenance charges, and an alleged \$15,000 gift that plaintiff paid to defendant based on the Option Agreement. Plaintiff also argues that \$16,057.19 in counsel fees should be deducted from his share and \$34,503.66 for counsel fees from defendant's share. Plaintiff argues that the plaintiff should receive \$180,391.95 and that defendant should receive \$64,224.17.

Defendant does not deny that he did not pay the loan amount. In his cross-motion, defendant argues based on RPAPL Article 9 that an accounting of the income and expenses of property is a mandatory step before dividing the money between parties. Defendant also argues that plaintiff's argument for the attorney fees is unfounded as plaintiff sought equitable remedy of partition and did not base the partition action on the remedies available under the contract. Defendant argues that he should be reimbursed for the maintenance payments that only he paid during the ownership of the apartment. Defendant contends that the \$15,000 difference between the loan amount and the purchase price is an unconditional gift from plaintiff that represents the close relationship between them. Defendant also seeks a status conference between parties.

Plaintiff, in its reply affirmation, argues that plaintiff is not responsible for the maintenance payment while defendant was the property's sole occupant. Plaintiff also argues that he is seeking the attorney fees only for the appeals and for defendant's alleged delays he used in the partition action. Plaintiff also states that he does not oppose defendant's request for a conference for the purpose of arguing the motions and possible settlement of the remaining

issues. Plaintiff further contends that he does not oppose defendant's request for accounting, as it was implicit in their motion.

1. Maintenance fees

Maintenance fees for a property owned by tenants in common are divided between the parties: "Absent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property." (*Degliomini v Degliomini*, 45 AD3d 626, 629 [2d Dept 2007] [internal citation omitted].) Plaintiff argues that defendant should incur all the maintenance fee as defendant occupied the apartment exclusively. As a general rule, tenants in common equally bear maintenance costs. (*Id.*) Plaintiff failed to provide the court any cognizable legal theory except a moral argument that defendant should be exclusively responsible for the cost incurred to maintain the apartment. Hence, plaintiff's argument lacks merit. Plaintiff's share from the proceeds of the apartment should be deducted for any unpaid maintenance fees by plaintiff from September 2002 to the sale of the apartment.

2. Attorney fees

Under Article 12 of the contract, "[o]bligor shall pay any and all legal fees of the obligee to enforce his rights hereunder." In plaintiff's partition action, plaintiff asserted the equitable right of partition based on the co-tenancy pursuant to RPAPL 901, not on the basis of the agreement in question. (Plaintiff's complaint.) Plaintiff never sought to sue on the Option Agreement for defendant's breach of the agreement. Plaintiff may not seek reimbursement for the costs he incurred in the partition action in the partition and sale of the property.

3. Alleged gift

The contract's language is clear regarding the alleged gift of \$15,000 to defendant. Under Article 4 of the contract,

"[t]he [defendant] shall repay the sum of sixty thousand dollars (\$60,000.00) plus interest in monthly installments. . . . The [defendant] shall have the benefit of a fifteen thousand gift at the time of full payment of the amount stated above or at the time he exercises his option herein to buy the [plaintiff] interest if [sic] full."

Defendant would receive the \$15,000 gift only when he paid the \$60,000 or when he exercised his option to buy plaintiff's interest in the apartment. Defendant failed to pay the required monthly payments. Based on the contract, if defendant failed to keep up with his monthly payment obligation, he may not benefit from the gift. Defendant argues that plaintiff gave him the gift because of their friendship. Defendant fails to provide any evidence that he would have received the \$15,000 regardless whether he exercised any of the two options under their contract. Defendant's allegation contradicts the contract's clear language. Plaintiff's share from the proceeds of the sale should increase by \$15,000.

Defendant's cross-motion for an accounting is granted without opposition. No status conference is needed.

The referee may distribute the remaining proceeds after adding \$15,000 to the plaintiff's share for the gift, deducting any unpaid maintenance fee by the plaintiff and defendant for the entire period of tenancy in common and after considering Judge Wright's final judgment of partition with the sale's instruction and the agreement between parties.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for an order to direct the referee to distribute the proceeds (motion seq. 003) is granted and referee may distribute funds after the accounting ordered under this order; and it is further

ORDERED that the defendant's cross-motion for an accounting is granted without opposition; and it is further

ORDERED that the plaintiff's motion seq. 004 is denied as academic given the court's decision on motion seq. 003; it is further

ORDERED that this action be forwarded to the referee for accounting and calculating each parties' respective share based on this court's order, and the referee may distribute the funds after deducting all the fees and expenses incurred based on the court's decision and order and the final judgment of partition and sale and the parties' agreements.

Dated: December 12, 2017


J.S.C.

HON. GERALD LEOVITS
J.S.C.