

Mentesana v Hawkins
2019 NY Slip Op 30375(U)
February 19, 2019
Supreme Court, Kings County
Docket Number: 516175/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____x
FRANK MENTESANA,

Plaintiff,

DECISION / ORDER

-against-

Index No. 516175/16

Motion Seq. No. 1

ANSELL HAWKINS,

Date Submitted: 2/14/19

Defendant(s).
_____x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment declaring and adjudging his rights with regard to real property owned by the parties.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation in Support and Exhibits Annexed....	<u>10-22</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>24-26</u>
Reply/ Supplemental Affidavit	<u>29-30</u>
Other: _____	_____

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

The parties in this action were divorced in New Jersey, pursuant to a judgment entered November 14, 2013 in the Superior Court of Essex County, entitled "Dual Final Judgment for Termination of Domestic Partnership [Doc 17]. The Judgment "makes a part of this Judgment with the understanding that the Court took no testimony and did not pass on the merits of" the parties' Property Settlement Agreement "except that this court has determined that both parties entered into said Agreement knowingly, voluntarily and believing said Agreement to be a fair and equitable resolution of the matters at issue between them and both agree to be bound thereby." It also states that the "Agreement

shall be incorporated but not merged with this Final Judgment.” The court notes that same-sex marriage became legal in New Jersey in October, 2013, a few weeks before the parties’ judgment was signed, and a year after they commenced their action to dissolve their domestic partnership. This legal proceeding also concluded in New Jersey before the United States Supreme Court decision in *Obergefell v Hodges*, 576 US _____ (2015), which ruled that the “fundamental right to marry” is guaranteed to all same sex couples in the United States.

On September 14, 2016, plaintiff commenced this action with regard to the parties’ weekend/summer home in Delaware County, New York, as they do not agree how to interpret the Property Settlement Agreement with regard to this property. At this time, both parties live in Brooklyn, New York.

The property in question is known as 165 Harold Robbins Road, Middleton, New York. The parties purchased it in 2006 and hold title as joint tenants with rights of survivorship.¹ There apparently is no mortgage on the property (¶ 5 complaint).

The complaint avers that the parties’ Property Settlement Agreement (hereinafter “PSA”) provides for the sale of the property once their son finishes his junior year in high school, to provide funds for his college education, as plaintiff claims in his affidavit in support. Both parties agree that this date has passed and that their son is in college now. Plaintiff avers that the PSA provides that, prior to a sale to a third party, there is a provision for one of the parties to buy out the other, and plaintiff wishes to do so but defendant refuses to cooperate in the purchase. Plaintiff next avers that the PSA provides that if

¹The deed was inadvertently not included as Exhibit A to the complaint, as the plaintiff only included Schedule A to the deed (the metes and bounds). Thus, the court asked plaintiff to provide a complete copy in a supplemental submission, which was provided.

there is no buy out of one party by the other, that the property should be listed for sale and the net proceeds divided equally, but defendant will not cooperate with a sale either. Plaintiff seeks a judgment enforcing the PSA or for compensatory damages, and in any event, for counsel fees incurred.

Defendant answered the complaint and has asserted a counterclaim for plaintiff's alleged breach of his financial obligations as set forth in the PSA, relating to both the property at issue and for other items, all of which total \$13,992.00. He asks to be paid this sum by plaintiff, plus counsel fees.

Plaintiff answered the defendant's counterclaim (Doc. 15) and asks for a trial as to the amount he allegedly owes to defendant.

DISCUSSION

First, the parties' claims that this court does not have jurisdiction over this contract dispute are incorrect, as both parties live in Brooklyn and the real estate at issue is located in the State of New York.

The court is asked to interpret and enforce the PSA with regard to the Middleton, New York property. It provides that (Page 13) the property will be listed for sale "no later than the end of [their son's] junior year of high school," which was on June 30, 2016. The agreement then provides that, if either party doesn't want to wait that long for his half of the proceeds, that he will notify the other party, who may agree to list the property for sale earlier, or he may "exercise a right of first refusal and purchase the property . . . within 90 days" [at the price calculated as described] or, if an extension of closing beyond this 90 days is not agreed to in writing, the property shall be listed for sale and the proceeds divided equally between the parties.

In plaintiff's affidavit in support of this motion, he states that he notified defendant

in writing on July 2, 2015 and again on July 19, 2015 and August 4, 2015 that he wanted to exercise his right of first refusal. He claims defendant did not respond except on February 16, 2016 (Exhibit H), wherein defendant said "no." However, the PSA does not provide plaintiff with a right of first refusal unless defendant asked to sell the property before June 30, 2016. As defendant did not do so, plaintiff's "right" never arose, as defendant's attorney correctly explains in his affirmation (§ 4).

Exhibit I to plaintiff's motion is a letter from plaintiff to defendant dated July 30, 2016 that states that the time had arrived to list the property for sale. This is a correct interpretation of the PSA. Plaintiff indicates that they could list it with a broker or sell it back to the son of the prior owner, who had contacted him. Defendant's response to plaintiff's letter came by a letter from an upstate attorney, not defendant's present attorney, dated August 17, 2016 [Exhibit J] which says, essentially, nothing. It says "advise me how you would like to resolve and terminate your joint ownership."

Defendant's affidavit in opposition includes a copy of a letter dated September 6, 2015 from defendant's prior attorney to plaintiff's current attorney, which plaintiff fails to acknowledge in his affidavit, which states that defendant wants to purchase plaintiff's one-half interest, and he will pay the amount required by the PSA plus \$10,000. Neither party provides a copy of any response to this letter. However, as stated above, to trigger a right of first refusal, the other party was required to demand a sale before June 30, 2016. Neither did so, and so neither party ever had a "right of first refusal." Defendant avers that the house should be listed for sale and the parties should both be allowed to bid on it.

The court finds and determines that the property must be listed for sale immediately, as it should have been sold more than two years ago. Both parties are entitled to bid on the property, as this is not forbidden by the PSA. However, incurring a broker's fee for a

sale between two owners would not be fair to the selling owner, who would not only be outbid but would then have to pay the entire broker's commission out of his one-half of the sale price. Thus, the listing agreement should be negotiated to provide that there will be no broker's commission on a sale to one of the owners. If that is not possible, the parties should share the commission one-half each.

If the property is not sold and closed by December 1, 2019, either party may bring a motion for the court to appoint a referee to sell the property to the highest bidder at an auction to be conducted at the Delaware County Courthouse, and for counsel fees incurred in connection with the motion.

Finally, the provision of the PSA with regard to counsel fees (Article VIII) states that "no request for counsel fees shall be made by either party to a court unless in the event of a breach of this Agreement." Both parties have asserted that the other has breached the agreement. The parties' claims for counsel fees are deferred to the trial. Plaintiff has not established in the motion papers that defendant has breached the agreement, so plaintiff is not entitled to counsel fees on the papers.

As the Note of Issue has been filed, and this action has been referred to the undersigned for a non-jury trial, it is hereby

DECLARED, ADJUDGED AND DECREED that the property at issue must be sold as soon as possible with the net proceeds split equally between the parties and \$17,000 held in escrow from plaintiff's one half until defendant's counterclaim is resolved. The parties shall execute a listing agreement with a broker of their choice no later than March 29, 2019, and shall cooperate in selling the property to the person making the highest offer by a date agreed upon, which shall be no later than August 16, 2019. And it is further

ORDERED that the parties shall appear for the trial of the plaintiff's claim for

counsel fees and defendant's counterclaim, on June 10, 2019 at 10:00 a.m. at the courthouse, Room 524. No adjournments shall be granted except for good cause shown.

This shall constitute the decision, order and judgment of the court.

Dated: February 19, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**