

Kosovsky v Kosovsky
2020 NY Slip Op 30752(U)
March 4, 2020
Supreme Court, New York County
Docket Number: 154893/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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GERTRUDE KOSOVSKY

Plaintiff,

- v -

KAREN KOSOVSKY,

Defendant.

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INDEX NO. 154893/2019
MOTION DATE 02/27/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 53 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Gertrude Kosovsky, the mother of defendant Karen Kosovsky, commenced this action seeking the partition and sale of apartment 32A, a cooperative apartment, in the building located at 200 Central Park South, New York, New York. Plaintiff alleges that she and her husband, defendant's father, purchased the apartment together with defendant in 2001, and after her husband's death, she now owns a 50% interest in the apartment with her daughter as tenants in common. Plaintiff also seeks an accounting regarding the income and expenses related to the apartment and asserts a claim for unjust enrichment, alleging that defendant forcibly excluded her from the apartment in January 2015. In her answer, defendant asserts various affirmative defenses to plaintiff's partition claim based on an alleged agreement entered by the parties in 2001, prior to the purchase of the apartment. Defendant claims that she and her parents agreed that defendant would have exclusive possession of the apartment, that her parents' interest in the apartment was in name only, that they would split the carrying costs of the apartment, and that they would not sell or partition the apartment without defendant's approval. Based on these allegations, defendant asserts counterclaims for constructive trust, breach of the 2001 agreement,

anticipatory breach of contract, fraud, unjust enrichment, adverse possession, fraud in the inducement, and declaratory judgment.

Plaintiff now moves pursuant to CPLR 3212 for summary judgment on her first cause of action seeking partition and sale of the apartment. Defendant opposes the motion and cross-moves for an order dismissing the complaint for failure to state a cause of action, striking plaintiff's affirmative defenses to the counterclaims and for summary judgment on the first counterclaim for a constructive trust and on the eighth counterclaim for a declaratory judgment that defendant owns 100% of the apartment's shares.

Under Real Property Actions and Proceeding Law § 901(1), a tenant in common may maintain an action for the partition of real property and for a sale if a partition cannot be made without great prejudice to the owners. *MurrayRayeDebbie, LLC v. Rosenphill LLC*, 172 A.D.3d 615 (1st Dep't 2018). Further, shares to a cooperative unit may be partitioned under RPAPL Article 9. *Damas v. Biggs*, 157 A.D.3d 454, 454-55 (1st Dep't 2018) (citing *Chiang v. Chang*, 137 A.D.2d 371 (1st Dep't 1988)). Generally, an accounting must be held as a matter of right prior to entry of an interlocutory or final judgment of partition and before any division of money between the parties is adjudicated. *Zabris v. Triades*, 46 Misc.3d 1224(A), at 3 (Sup. Ct. Suffolk Cty. 2015), citing *Sampson v. Delaney*, 34 A.D.3d 349, 349 (1st Dep't 2006); *McCaffery v. McCaffery*, 2018 WL 1598617, at *6 (E.D.N.Y. 2018). However, a sale without an accounting is permissible where neither party has demanded an accounting and there are no claims for an adjustment of rights of any party due to the unequal sharing of costs and contributions. *Zabris*, 46 Misc.3d 1224(A), at 3, citing *McCormick v. Pickert*, 51 A.D.3d 1109, 1110-11 (3d Dep't 2008).

In her complaint, plaintiff asserts a claim for an accounting for income earned or realized in connection with the apartment and a claim for unjust enrichment based on her alleged ouster from the apartment since January 2015. In her answer and counterclaims, defendant disputes these allegations and claims that she is entitled to repayment of plaintiff's alleged share of the carrying costs for the apartment. She also claims that she will be prejudiced if the apartment is sold prior to an accounting as this is her residence and she will not be able to purchase another property if the proceeds of sale are escrowed pending an accounting. Accordingly, plaintiff's motion for summary judgment on its partition and sale claim is premature as the parties' respective rights and interests in the property, and the adjustment of any equities must be determined before the sale of the apartment. *Sampson v. Delaney*, 34 A.D.3d 349, 349 (1st Dep't 2006); *Tuminno v. Waite*, 110 A.D.3d 1456, 1457-58 (4th Dep't 2013).

Turning to defendant's cross-motion, defendant moves pursuant to CPLR 3211(a)(7) to dismiss plaintiff's complaint. Defendant argues primarily that plaintiff is not entitled to partition since, pursuant to the alleged 2001 Agreement, plaintiff owns the apartment in name only and agreed that she would not seek the sale of the apartment without defendant's consent. However, other than her affidavit, defendant has not submitted any evidence of this agreement, which was not memorialized in writing. Thus, defendant has failed to show that plaintiff has no right to partition and sale of the apartment. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (2014) ("When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff has stated a cause of action to whether it has one."); *Miglino v. Bally Total Fitness*, 20 N.Y.3d 342, 351 (2013) (affidavits in support of motion to dismiss, which contradicted plaintiff's claim that defendant did not employ appropriate life-saving measures, were inadequate to warrant dismissal on motion to dismiss).

Next, defendant seeks to dismiss plaintiff's affirmative defenses to her counterclaims.

"On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law." 534 East 11th Street Housing Dev. Fund. Corp. v. Hendrick, 90 A.D.3d 541, 542 (1st Dep't 2011). Defendant argues that plaintiff's fourth affirmative defense based on the statute of frauds lacks merit because it is not applicable to defendant's counterclaim for a constructive trust. However, defendant asserts other counterclaims based on the alleged 2001 agreement, including a breach of contract claim. Thus, this affirmative defense will not be dismissed. Likewise, plaintiff's affirmative defenses based on the statute of limitations and laches cannot be dismissed as defendant has failed to show that these counterclaims lack merit. Further, given the defendant's arguments concerning the equities in this case, it is premature to dismiss plaintiff's affirmative defense of unclean hands.

Finally, defendant seeks summary judgment on her counterclaims for a constructive trust and a declaratory judgment, which are based on the alleged 2001 agreement. However, as discussed above, the only evidence defendant submits to support the existence of this agreement is her affidavit describing the terms of the agreement, which plaintiff disputes. Therefore, she is not entitled to summary judgment on these counterclaims. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendant's cross-motion to dismiss and for summary judgment is denied.

3/4/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: