Cruz v Marte
2020 NY Slip Op 35771(U)
December 21, 2020
Supreme Court, Queens County
Docket Number: Index No. 704014/18
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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BARTOLO CRUZ,

Plaintiff,

Index No.: 704014/18
Mot. Date: 10/6/20
Mot. Seq. 2

-against-

MARGARITA R. MARTE and U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF DECEMBER 1, 2006 MASTR ASSET BACKED SECURITIES TRUST 2006-HE5 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006 HE-5, ,

Defendants.

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The following papers were read on this this motion by plaintiff Bartolo Cruz for, *inter alia*, summary judgment directing the partition of property, known as 115-20 130th Street, South Ozone Park, New York: and on this cross motion by defendant Margarita Marte for, *inter alia,* summary judgment dismissing the first and second causes of action asserted against her

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits	EF 34-47
Notice of Cross Motion - Affidavits - Exhibits	EF 48-57
Answering Affidavits - Exhibits	EF 59
Reply Affidavits	EF 62

Upon the foregoing papers it is ordered that the motion is denied; and the cross-motion is denied.

I. The Plaintiff's Allegations

On or about July 23, 2004, plaintiff Bartolo Cruz and defendant Margarita R, Marte took title to property improved by a two-family home, known as 115-20 130th Street, South Ozone Park, New York. Plaintiff paid half of the down payment, and the parties agreed to be equal co-owners of the property. The parties also agreed to share equally in the income and expenses of the property. On or about August 12, 2006, the plaintiff and the defendant mortgaged the subject property to New Century Mortgage Corporation for $654,500.00. The plaintiff remains liable on the note and mortgage.

The parties lived in the house, from 2004 until 2015, when the defendant forced the plaintiff to leave the premises. Plaintiff contributed $900.00 per month for the mortgage, from 2004 to 2009, and $600 per month, from 2009 until 2015. The parties paid the rest of the monthly costs with rental income.

Plaintiff has discovered that the deed made him only a 10% owner of the property. Defendant has refused to accept a reformation of the deed.

II. The Defendant's Allegations

Defendant Marte met plaintiff Cruz, in 1998. They began to live together in 2001. In 2006, she had to call the police about him. She obtained an order of protection against him in 2008.

The deed to the subject property, dated July 23, 2004 clearly states: "Bartolo Cruz *** with a 10% interest" and " Margarita Vega *** with a 90% interest." The subject property cost $580,000. Defendant Marte purchased the property before the parties began to live together, with a $50,045 check that she obtained from the refinance of another property that she owned. Plaintiff did not contribute toward the down payment. Plaintiff did not pay $900.00 toward the mortgage for nine years. Plaintiff did pay $600.00 per month for the expenses of the parties and of their child. Plaintiff's claim that he paid for various repairs is false.

III. The Complaint

Plaintiff began the instant action by the filing of a summons and a complaint, on March 16, 2018. The first cause of action is brought pursuant to Article 15 of the New York Real Property Actions and Proceedings Law for the purpose of quieting title and compelling the determination of claims to real property. The second cause of action seeks a partition and sale of the property.

The third cause of action seeks an accounting. The fourth cause of action is for unjust enrichment.

IV Discussion

A. The First Cause of Action

RPAPL 1501(1) provides that a person claiming an interest in real property may maintain an action against any other person to compel the determination of adverse claims. (*See Deramo v Laffey,* 149 AD3d 800 [2nd Dept 2017]; *Garcia v Velaquez*, 228 AD2d 937 [3rd Dept 1996].)

Defendant's cross-motion seeks an order permitting her to serve an amended answer asserting the statute of limitations as an affirmative defense. If there has been a long delay in moving for permission to amend, the party seeking the amendment must offer a reasonable excuse for the delay. (*Tinch-McNeill v Alcohol & Drug Dependency Servs., Inc*., 96 AD3d 1407 [4th Dept 2012]. The instant action has been pending since March 16, 2018. Defendant, not an attorney herself, filed a *pro se* answer, on May 1, 2018, that did not raise the statute of limitations. On August 9, 2018, attorney Charles Zolot filed a Notice of Appearance as the defendant's attorney. Plaintiff filed a Note of Issue, on August 1, 2019. Attorney Zolot did not file the cross-motion seeking an amendment of the answer, until January 11,2020, long after the filing of the Note of Issue. Defendant did not offer a reasonable excuse for the delay. "Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion ***." (*Thibeault v Palma*, 266 AD2d 616, 617 [3d Dept 1999]; *Senior Care Servs., Inc. v New York State Dep't of Health*, 46 AD3d 962[3d Dept 2007].) In the case at bar, the plaintiff would

also be prejudiced by a late amendment of the answer raising the statute of limitations. Discovery has already been concluded, and the plaintiff was deprived of the opportunity to have discovery on such issues as whether the defendant is estopped from raising the statute of limitations because of her conduct. (*See Konner v New York City Transit Auth.,* 143 AD3d 774, 776 [2d Dept 2016] ["conduct that misled or discouraged a party from serving a timely notice of claim"]; *In re Estate of Thomas*, 124 AD3d 1235, 1240 [4th Dept 2015] [" equitable estoppel precludes a party from asserting the statute of limitations as a defense where the party commencing the action or proceeding was 'induced by fraud, misrepresentations or deception' not to file a timely petition"].)

In any event, the respective interests of the parties will have to be determined pursuant to the second cause of action for a partition and sale of the property. (*See* RPAPL 915; *Lauriello v Gallotta*, 70 AD3d 1009 [2d Dept 2010].)

Neither side is entitled to summary judgment on the first cause of action. Summary judgment is not warranted where there is an issue of fact which must be tried. (*See Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) In view of the sharply conflicting allegations of the parties, there are numerous issues of fact which preclude summary judgment for either side. There are issues of fact and credibility which are inappropriate for summary judgment treatment. (*See Charlery v Allied Transit Corp.,* 163 AD3d 914 [2d Dept 2018]; *Chimbo v Bolivar,* 142 AD3d 944 [2d Dept 2016]*; Bi Bo Chiu v Malik*, 86 AD3d 548 [2d Dept 2011].)

B. The Second Cause of Action

RPAPL 901 provides in relevant part: " 1. 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." (*See Coston v Greene*, - AD3d-, -NYS3d- 2020 WL 6930884 [2d Dept 2020]; *Tsoukas v Tsoukas*, 107 AD3d [2d Dept 2013]). "While partition is governed by statute, the actual remedy is subject to the equities between the parties ***." (*Pando v Tapia*, 79 AD3d 993, 995 [2nd Dept 2010]). "The right to partition is not absolute,***, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the

remedy is always subject to the equities between the parties ***." (*Tsoukas v Tsoukas*, *supra*, 880; *Coston v Greene*, *supra; Arata v Behling,* 57 AD3d 925 [2d Dept 2008].)

In the case at bar, defendant Marte raised triable issues of fact concerning the parties' respective interests, rights, and share in the property, requiring the denial of summary judgment for plaintiff Cruz on the second cause of action. (*See Coston v Greene*, *supra*.) Moreover, the defendant raised triable issues of fact concerning whether the equities are in her favor. (*See Tsoukas* v *Tsoukas, supra; Arata v Behling*, *supra*; *Stressler v Stressler*, 193 AD2d 728, [2d Dept 1993] [former husband not entitled to partition of marital residence because parties' minor son still resided there].)

Contrary to the defendant's contention, the second cause of action is not barred by the statute of limitations. An action for partition "by one or more cotenants is unaffected by any limitations period for as long as the cotenancy survives." (*Rokeach v Zaltz*, 112 AD2d 209, 209 [2d Dept 1985]; *Diana v DeLisa*, 151 AD3d 806 [2d Dept 2017].)

C. The Third Cause of Action

The third cause of action is for an accounting. RPAPL 945, " Judgment adjusting rents and profits," provides: "The court may adjust the rights of a party as against any other party by reason of the receipt by the latter of more than his proper proportion of the rents or profits of a share." (*See Valle v Gensert*, 149 AD3d 582 [1st Dept 2017] [remand for a determination of defendant's credit, pursuant to RPAPL 945, for amounts paid by him in association with the premises].) "[A]n accounting is a necessary incident of a partition action and should be had as a matter of right before entry of the interlocutory or final judgment and before any division of money between the parties." (*McCormick v Pickert*, 51 AD3d 1109 [3d Dept 2008] [internal quotation marks and citation omitted].) However, summary judgment on the third cause of action would be premature at this stage of the action.

D. The Fourth Cause of Action

The fourth cause of action is brought on the theory of an unjust enrichment. To prevail on a claim for unjust enrichment, the plaintiff must prove "that (1) the other

party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered ***." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]; *Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511, 516 [2012].) There are issues of fact and credibility which are inappropriate for summary judgment treatment. (*See Charlery v Allied Transit Corp., supra*; *Chimbo v Bolivar, supra*; *Bi Bo Chiu v Malik*, *supra.*)

Accordingly, based upon the foregoing, it is

ORDERED that the motion is denied and it is further

ORDERED that the cross-motion is denied.

Dated: December 21, 2020

TIMOTHY J. DUFFICY, J.S.C.

FILED

12/24/2020
12:04 PM

COUNTY CLERK
QUEENS COUNTY