

Humphrey v Yates

2021 NY Slip Op 30764(U)

March 8, 2021

Supreme Court, Kings County

Docket Number: 513658/2020

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

-----X

KIRI HUMPHREY,

Plaintiff,

-against-

KELSY YATES,

Defendant.

-----X

DECISION/ORDER

Index No.: 513658/2020

Motion Seq. No. 1

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendant's pre-answer motion to dismiss the complaint.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, and Exhibits	<u>3-8</u>
Answering Affirmations and Exhibits	<u>12-15</u>
Reply Affirmations	<u>16</u>

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

This is an action to partition the real property known as 19 Cambridge Place in Brooklyn, NY. Plaintiff alleges that he (husband) and defendant (wife) own the property in fee simple as tenants in common. He further asserts that both parties reside in Colorado. Plaintiff and defendant are married and lived at the premises prior to their separation in 2016. Plaintiff alleges that defendant has been collecting the rents for the apartments in the building without giving him his 50% share of any net profit (see E-File Doc 6 [Complaint]). Plaintiff seeks, apart from partition (first cause of action), an accounting of rents collected and expenses paid (second cause of action), an equitable lien for the allegedly unpaid distributions of rents and profits previously collected (third

cause of action), damages for waste on the basis that the building has fallen into disrepair and defendant has evicted tenants so the apartment(s) are vacant (fourth cause of action), and an injunction enjoining defendant from preventing the plaintiff from using the property and from transferring or disposing of her one half of the property (fifth cause of action).

In Motion 1, defendant moves, pre-answer, to dismiss the complaint pursuant to CPLR 3211 (a) (4) and (a) (7). Defendant argues that the complaint should be dismissed because there is a prior ongoing action (the parties' 2016 divorce proceeding in Colorado) in which the subject property is at issue. Defendant further argues that the third, fourth, and fifth claims fail to state a cause of action.

Defendant submits her own affidavit, in which she explains that the parties were married in 2005 and filed for divorce in 2016, both in Colorado. The Colorado divorce proceeding has been ongoing for more than four years and, in that action, an appointed Special Master has submitted a Final Report & Order. She avers that she lived in the Brooklyn property with her children until 2016. From 2016-2019, she has resided in Colorado "but still spent 3-6 months at a time in the [property]" and "ha[s] been paying the mortgage" (E-File Doc 5 [Yates Aff]). She disputes plaintiff's claim that she excluded plaintiff from the property, and avers that in the divorce proceeding she was granted temporary sole use of the property (*id.*; E-File Doc 8 [9/27/17 Order, Colorado action] ["With respect to the property located at 19 Cambridge Place, Brooklyn, NY 11238 . . . , Wife is awarded temporary sole use and possession of the residence upon agreement of the parties."]).

In the Special Master's Final Report, Recommendations and Order (Report), the Special Master states that he was appointed in September 2017 in the Colorado action to serve as a discovery master and investigate evidence from the parties and their experts as to the property at issue in the divorce proceeding (E-File Doc 7). The Report contains the Special Master's findings with respect to the Brooklyn property. He states that the parties intended to renovate the building so they could reside in a two-floor duplex and rent the other floors. They finished their unit and one other, but they demolished, but did not finish, the upper floors, which remain uninhabitable. The Report found that the parties each have a 50% interest in the property, which was found to have a value of nearly \$2 million. Although the property was purchased a year before the marriage, the Special Master seems to treat it as marital property.

Defendant argues that the instant action should be dismissed in its entirety because the earlier Colorado action has been proceeding for four years, discovery and fact finding has been completed, and the disposition of this property is at issue in the Colorado divorce action, rendering this action completely duplicative. She also argues that the third, fourth, and fifth causes of action are defective. Specifically, she contends that the third cause of action must be dismissed because an equitable lien is not available to plaintiff as they are tenants in common and the accounting that would accompany an order of partition renders any such lien unnecessary. Defendant contends that the fourth cause of action for waste is defective because plaintiff alleges no facts in the complaint to support the conclusory assertion that defendant permitted the property to fall into a "state of disrepair." Defendant also argues that the fifth cause of action, for a preliminary injunction, is defective because a preliminary injunction is

relief, not a claim. In any event, she argues that the relief sought in the fifth cause of action is totally inappropriate because plaintiff has not demonstrated irreparable harm, likelihood of success on the merits, or that the equities tip in his favor.

Plaintiff responds that the court should exercise its discretion and deny the motion to dismiss in spite of the prior Colorado action because that action is not sufficiently similar to this partition action and the relief sought in this action cannot be obtained in the Colorado divorce proceeding. Plaintiff concedes that an accounting incident to a partition order would render the third cause of action (equitable lien) moot and consents to dismiss that claim. Plaintiff argues that the waste cause of action should not be dismissed for failure to state a cause of action because he alleges in the complaint that defendant “committed acts of waste . . . including allowing a substantial portion of the premises to fall in a state of disrepair and evicting tenants therefrom.” Finally, plaintiff consents to dismiss the fifth cause of action (preliminary injunction). Alternatively, plaintiff seeks leave to amend the complaint in the event that the court deems the complaint to be insufficiently pled.

In reply, defendant argues for the first time that Colorado law imposes an automatic stay, that is, a temporary injunction restraining divorcing parties from transferring or otherwise disposing of or encumbering property without consent of the other party or a court order (CRS § 14-10-107 [4] [b] [I] [A]). New York has a similar law. This temporary injunction applies to all Colorado divorce proceedings and takes effect upon service of the commencement documents on the opposing party. The injunction ends upon resolution of the action or by court order. Defendant argues that

this action should be dismissed or, in the alternative, stayed pending resolution of the Colorado action.

Discussion

CPLR 3211 (a) (4) provides that a party may move for dismissal of one or more causes of action on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.” “CPLR 3211 (a) (4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action” (*Koko Contr., Inc. v U.W. Marx, Inc.*, 24 Misc 3d 1239(A) [Sup Ct, Suffolk County 2009], citing *Whitney v Whitney*, 57 NY2d 731, 454 [1982]). Whether to dismiss, or what other remedy to craft, under CPLR 3211 (a) (4) is dependent on the totality of the circumstances (*see e.g. Rothschild v Braselmann*, 157 AD3d 1027, 1029 [3d Dept 2018] [staying an action brought in Supreme Court pending resolution of a similar action in the Court of Claims to “preserve any rights of recovery that plaintiff has available, prevent disparate outcomes and limit duplicative and costly litigation”]).

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88; *see also Pacific W., Inc. v E & A Restoration, Inc.*, 178 AD3d 834, 835 [2d Dept 2019]).

Here, the Colorado action is a divorce proceeding, not a partition action, but the disposition of the Brooklyn property may be directed in either matter. However, as the property at issue here was purchased prior to the marriage, it is not clear that this property will be determined to be marital property. If it is determined to be separate property, the Colorado action will not order it sold, and the court in Colorado may not direct defendant to provide plaintiff with an accounting.

Thus, while the court finds that dismissal is not appropriate at this time, proceeding to determine the cause of action for partition and directing an accounting would be premature. To be clear, the Colorado court has not yet determined whether the Brooklyn property is marital property. “[S]eparate real property acquired before marriage is not subject to equitable distribution [in New York]. Instead, an Article 9 partition action must be brought to determine the couple’s rights in the separate real property” (10 Warren’s Weed New York Real Property § 103.24 [2020]). The parties here must complete their divorce proceeding. If the Brooklyn property is determined to be separate property, plaintiff will be able to proceed with this partition action. Therefore, this action must be stayed pending resolution of the Colorado action.

Turning to the branch of the motion which seeks to dismiss the “defective” causes of action, the court finds that some of plaintiff’s causes of action must be dismissed. A tenant in common may maintain a cause of action for waste against a co-tenant who commits waste upon the real property under RPAPL § 817. If successful, the complaining co-tenant may elect damages or have partition as a remedy. New York courts also recognize a common law claim of waste. “[A]n action for waste will lie against a co-tenant who fails to undertake certain repairs on the property” (*Travelers*

Ins. Co. v 633 Third Assoc., 14 F3d 114, 121 [2d Cir 1994], citing *Watner v P & C Food Mkts., Inc.*, 138 AD2d 959 [4th Dept 1988] [noting that a “tenant has an implied obligation to refrain from affirmative acts of waste and to make ‘tenantable’ repairs to avoid permissive waste of the leasehold”]).

Plaintiff does not indicate whether his cause of action for waste is made under the RPAPL or the common law. In any event, his claim is deficient, as it is supported by only conclusory, speculative assertions. Plaintiff alleges, “on information and belief, the Defendant has entered upon the premises and committed acts of waste thereon, including allowing a substantial portion of the premises to fall into a state of disrepair and evicting tenants therefrom, and did thus waste, injure and destroy the said premises to the great and irreparable damage of the Plaintiff.” If part of the premises is half-renovated, it cannot be rented. In any event, plaintiff’s allegations are insufficient. If this action is restored, he can move to amend the complaint if he is able to state a cause of action for waste.

Accordingly, it is **ORDERED** that the motion is granted to the extent that the fourth cause of action (waste) is dismissed without prejudice, the third and fifth causes of action are dismissed on consent, the fourth cause of action is dismissed pursuant to CPLR 3211 (a) (7), and the remainder of the action (the first and second causes of action, for partition and an accounting) is **HEREBY STAYED** pending the resolution of the parties’ divorce proceedings in the Colorado action, *Yates v Humphrey*, Case No. 16DR30252, Div. 303 (District Court, Denver County, Colorado). A motion or a stipulation is required to lift the stay.

It is further, *sua sponte*,

ORDERED that the Clerk of the Court is directed to seal NYSCEF Documents 7 (Special Master's Final Report & Order) and 8 (9/29/17 Order in the Colorado action) in this action (see DRL § 235), and it is further

ORDERED that, absent further order of the court, the Clerk shall deny access to these documents to anyone except for counsel of record to any party to this case, to a party, and to any representative of counsel of record for a party, upon presentation to the Clerk of written authorization from said counsel.

Dated: March 8, 2021

ENTER:



Hon. Debra Silber, J.S.C.