

Sawo v Williams
2021 NY Slip Op 31719(U)
May 19, 2021
Supreme Court, Kings County
Docket Number: 506418/2019
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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DOROTHY SAWO,

Index No.: 506418/2019
Motion Date: 04/21/2021
Motion Seq.: 04, 05

Plaintiff,

– against –

DECISION AND ORDER

MARGARET WILLIAMS and VICTOR TEMPLE,

Defendants.
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The following e-filed documents, listed by NYSCEF document number (Motion 04) 61-77 and (Motion 05) 82-92 were read on this motion for summary judgment.

In this action for partition of real property, the plaintiff, Dorothy Sawo, moves (Motion 04) for an Order: 1) striking defendants' defenses and counterclaims pursuant to CPLR § 3211(b); 2) awarding summary judgment in favor of the plaintiff on its third cause of action, to force a partition sale, pursuant to CPLR § 3212; and 3) awarding summary judgment in favor of the plaintiff on its fifth cause of action for costs and attorneys' fees in the amount of not less than \$25,000.00. The defendants, Margaret Williams and Victor Temple, cross move (Motion 05) for an order: 1) dismissing the plaintiff's first, second and fourth causes of action pursuant to CPLR §§ 213(1) and (8) on the ground that these causes of action are barred by the applicable statute of limitations, and/or in the alternative; 2) dismissing second and fourth causes of action pursuant to CPLR § 3016(b) for failure to properly state in detail the circumstances constituting misrepresentation and fraud. Both motions are granted in part for the reasons set forth below.

The instant motions were originally scheduled for oral argument on February 17, 2021. At that time, the parties conferenced the matter with the Court and agreed to resolve both motions with a sale of the property, and the Court issued an order on the same day granting the application for a partition sale and directing counsel to consult with each other in order to determine the highest offer. However, on February 19, 2021, defendants' counsel sent an e-mail to the Court explaining that although he had represented two days prior that the subject property was vacant, he was later informed by his client that the property contained subtenants and that he could not guarantee delivery of a vacant unit at closing prior to September 2021. The Court then scheduled a conference for March 12, 2021 in an attempt to resolve these issues, but the parties could not come to a resolution. This matter was then placed back on the calendar for April 21, 2021, at which time the Court heard further argument on Motions 4 and 5. Counsel requested a vacatur of the February 17th order and a decision on the motions. Notably, although there is much contention between the parties, both sides agree that the third cause of action for partition should be granted, and that the property should be sold.

The plaintiff states that she first acquired title to the subject property, a condominium located at 1500 Bedford Avenue, Brooklyn, New York 11216, Block 1245, Lot 1017 on

November 19, 1999. At one point, the plaintiff and Mr. Temple were living together as a couple, but the relationship did not last even though plaintiff “remained loyal” to Mr. Temple. Plaintiff alleges that after they separated, Mr. Temple advised her to refinance the property and that she was misled into signing a Deed on May 18, 2005 transferring 50% of the property to Margaret Williams, with whom Mr. Temple was having an affair. Plaintiff states that Ms. Williams did not pay any consideration for this transfer. Plaintiff also alleges that defendants took a mortgage out in her name and used the entire sum of \$392,000.00. Plaintiff states that Mr. Temple now resides at the subject property alone and does not pay her rent, though counsel for Mr. Temple later asserted that subtenants now reside at the property. In her affidavit the plaintiff states that, at the time of the 2005 transfer, Mr. Temple had a messenger deliver the documents required for the refinance to her while at work, and that she trusted him and signed them due to a busy work schedule and her relationship with Mr. Temple.

Plaintiff first argues that the defendants have failed to adequately respond to discovery requests, in that in response to plaintiff’s request for documents from January 2005 to present, the defendants only provided a Deed, an Open Item Statement for the Common Charges for the Subject Property, and a Mortgage Note. Plaintiff states that if certain documents do not exist, defendants should submit an affidavit explaining, inter alia, why the documents were not produced. Plaintiff alleges that any omissions are intentional because they would damage defendants’ case. Plaintiff now seeks to expunge the deed that was allegedly fraudulently transferred to Ms. Williams or, in the alternative, selling the subject property and dividing the proceeds less costs amongst the parties. Plaintiff further contends that since a condominium cannot be physically partitioned, the only option is a sale at public auction. *Lauriello v Gallotta*, 70 AD3d 1009, 1010 (2d Dept 2010) (“The actual physical partition of property is the preferred method and is presumed appropriate unless one party demonstrates that actual physical partition would cause great prejudice, in which case the property must be sold at public auction.”); see also *Snyder Fulton St., LLC v Fulton Interest LLC*, 57 AD3d 511 (2d Dept 2008).

The defendants oppose, chiefly arguing that the plaintiff’s claims are barred by the statute of limitations applicable to each cause of action. The defendants further argue that the plaintiff’s claims of fraud are not plead with sufficient particularity pursuant to CPLR § 3016(b), and in any event are also barred by a six-year statute of limitations. However, in the papers, the defendants do not specifically oppose the prong of plaintiff’s motion seeking a partition of the property, and in fact support the selling of the property.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); see also *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; see also *Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); see also *Alvarez* at 324; *Zuckerman* at 562. Generally,

the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman* at 562.

It is well-settled that one who holds an interest in real property as a tenant in common may maintain an action for the partition of the property and for a sale, if it appears that a partition alone would greatly prejudice the owners of the premises. *See* RPAPL § 901(1); *see also Tsoukas v Tsoukas*, 107 AD3d 879 (2d Dept 2013); *Donlon v Diamico*, 33 AD3d 841 (2d Dept 2006). However, before a partition or sale may be directed, a determination must be made as to the rights, shares or interests of the parties and where a sale is demanded, whether the property or any part thereof is so circumstanced that a partition cannot be made without great prejudice to the owners. *See* RPAPL § 915. Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises. *See* RPAPL §§ 911 and 915; *Hales v Ross*, 89 AD3d 1261 (2d Dept 2011); *see also Lauriello*, 70 AD3d at 1010 (2d Dept 2010).

Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report. *See* RPAPL § 911; § 907; *see also Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869 (2d Dept 1985). Moreover, because of the equitable nature of a partition action, an accounting by and between the parties is necessary, and should be done as a matter of right before entry of an interlocutory or final judgment, and before any division of funds between the parties is adjudicated. *See Donlon* at 842. The Court has the authority to adjudicate the rights of the parties “so each receives his or her proper share of the property and its benefits.” *See Brady v Varrone*, 65 AD3d 600, 602 (2d Dept 2009).

Here, the plaintiff has met its prima facie burden with regard to the remedy sought by its third cause of action for a partition sale through the submission of the 1999 and 2005 deeds and the affidavit of the plaintiff. The plaintiff has established that she is a rightful one-half owner of the property and that the nature of the property, a condominium, is such that a physical partition “cannot be made without great prejudice to the owners.” *Grafteo v Paciello*, 46 AD3d 613, 615 (2d Dept 2007). At oral argument on the instant motions, counsel for the defendant stated that he had no objection to the partition of the property and agreed that the property needs to be sold. In light of the foregoing, the prong of the plaintiff’s motion seeking partition and sale of the property is granted.

The defendant also cross moves to dismiss causes of action one, two, and four pursuant to CPLR §§ 213(1) and (8) on the ground that the relevant statutes of limitation had expired; in the alternative, the defendants seek dismissal of the second and fourth causes of action for failure to plead fraud with particularity pursuant to CPLR § 3016(b). The plaintiff’s first cause of action is for permanent injunction; the second cause of action seeks to expunge the fraudulent transfer of a deed that occurred in approximately April 2005; and the fourth cause of action, while unnamed, also sounds in fraud that occurred approximately 14 years prior to the filing of the complaint.

“A cause of action alleging fraud must plead all of the following elements: (1) a material misrepresentation or a material omission of fact which was false and which the defendant knew

to be false, (2) made for the purpose of inducing the plaintiff to rely upon it, (3) the plaintiff's justifiable reliance on the misrepresentation or material omission, and (4) injury." *Nabatkhorian v Nabatkhorian*, 127 AD3d 1043, 1043-1044 (2d Dept 2015). "[I]n any action based upon fraud, the circumstances constituting the wrong shall be stated in detail." *Id.* at 1044 (internal quotation marks removed); *see also* CPLR § 3016(b). "[A]n essential element of any fraud [claim] is that there must be reasonable reliance, to a party's detriment, upon the representations made' by the defendant against whom the fraud claimed has been asserted." *Nabatkhorian* at 1044, quoting *Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 (1st Dept 2013); *see also* *New York Military Academy v NewOpen Group*, 142 AD3d 489 (2d Dept 2016).

Furthermore, actions to recover damages for fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it." CPLR § 213(8). "For the purposes of the discovery rule, a plaintiff's cause of action accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence." *Marasa v Andrews*, 69 AD3d 584, 584 (2d Dept 2010) (internal quotation marks removed); *see also* *Oggioni v Oggioni*, 46 AD3d 646 (2d Dept 2007).

Here, the defendant has established its entitlement to dismissal of the second and fourth causes of action on the ground that the plaintiff failed to set forth the details of the alleged fraud with particularity pursuant to CPLR § 3016(b). The plaintiff does not plead with any detail the circumstances constituting the wrong, alleging only that she trusted defendant Mr. Temple at the time and did not realize that she was conveying a one-half interest in her property to Ms. Williams. *See Nabatkhorian* at 1044. In addition, the plaintiff's claims also fail on the ground that the statute of limitations for fraud had expired. The plaintiff alleges that the fraudulent transfer of the deed occurred in approximately 2005, and states in her complaint that she became aware of the transfer "most recently" but does not specify when. The plaintiff also fails to explain why, over the course of approximately 14 years from the date of the allegedly fraudulent transfer to the time the complaint was filed, she would have been unable to discover the fraud with any reasonable diligence on her part. *See Marasa* at 584. In light of the foregoing, the defendant's cross motion is granted to the extent that the plaintiff's second and fourth causes of action are dismissed.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the plaintiff's motion for summary judgment (Motion 04) is granted only as to the third cause of action seeking partition and sale of the property, and is in all other respects denied; and it is further

ORDERED AND ADJUDGED, that the plaintiff has demonstrated that the property cannot be physically partitioned without great prejudice to the owners; and it is further

ORDERED AND ADJUDGED, that the plaintiff and co-defendant Margaret Williams each own an undivided one-half interest in the subject premises as tenants in common; and it is further

ORDERED AND ADJUDGED, that a Special Referee is hereby appointed to hear and report or, if the parties consent, hear and determine all issues pertaining to an accounting as to expenses incurred by the parties, including real property taxes, utility bills and mortgage payments, liens and/or encumbrances, and the parties' relative share of the cost and expenses necessary for the maintenance and operation of the property; and it is further

ORDERED AND ADJUDGED, that an Interlocutory Judgment of Partition and Sale will be issued subsequent to the submission of the Special Referee's hearing and determination concerning the accounting; and it is further

ORDERED AND ADJUDGED, that the defendants' cross motion (Motion 05) is granted only to the extent that plaintiff's second and fourth causes of action are dismissed, and is in all other respects denied.

This constitutes the decision and order of the Court.

DATED: May 19, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.