

Cummock v Cummock
2022 NY Slip Op 31630(U)
May 19, 2022
Supreme Court, New York County
Docket Number: Index No. 156194/2020
Judge: Lori Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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M. VICTORIA CUMMOCK AS TRUSTEE OF THE M.
VICTORIA CUMMOCK TRUST

Plaintiff,

- v -

MATTHEW CUMMOCK,

Defendant.

INDEX NO. 156194/2020

MOTION DATE 03/11/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this action for partition of the real property known as Tower Unit No. 1202 located at 60 Riverside Boulevard, New York, NY 10069 (“the Property”), M. Victoria Cummock, as trustee of the M. Victoria Cummock Trust (“Plaintiff”) moves, *inter alia*, for summary judgment on her claim for partition; an order directing the sale of the Property and declaring that she is entitled to two-thirds of the sale proceeds; and for an order appointing a referee to oversee a sale and conduct an accounting of contributions and expenses. Defendant Matthew Cummock (“Matthew”), the son of M. Victoria Cummock (“Victoria”), does not oppose a sale but contends its proceeds must be divided equally. Plaintiff’s motion is granted in part and denied in part as set forth below.

Victoria and Matthew purchased the Property, a three-bedroom apartment in a luxury West Side condominium, in 2012. At the time of the purchase, Victoria primarily resided in Florida and Matthew lived in New York, where he was attending medical school. Per the terms

of the deed dated July 27, 2012 (“Purchase Deed”), Victoria and Matthew took title to the Property as joint tenants with right of survivorship (NYSCEF Doc No. 12). According to Plaintiff’s moving affidavit, the Property was purchased outright using funds from the M. Victoria Cummock Trust, Victoria’s personal funds, and funds from the Matthew D. Cummock Irrevocable Trust, which Victoria maintains she had established for Matthew’s benefit (NYSCEF Doc No. 11, “Victoria Cummock Affidavit,” at ¶ 14).

The acquisition price for the Property was \$2,990,884.20, which included a 15% down payment delivered upon the signing of the purchase agreement (NYSCEF Doc No. 14, “Closing Statement”). According to Plaintiff’s affidavit and her notes on the Closing Statement, the Matthew D. Cummock Irrevocable Trust paid the \$425,243 down payment and \$560,518 at closing while Victoria, using personal funds and funds from the M. Victoria Cummock Trust, paid the remaining \$2,005,083.20 (Victoria Cummock Affidavit at ¶¶ 14-18; NYSCEF Doc. No. 15; NYSCEF Doc. No. 16).

Victoria contends that since the purchase, she has paid “100% of the improvement, maintenance and carrying costs related to the [P]roperty (minus one third of one month of expenses)” (Victoria Cummock Affidavit at ¶ 30). She further made a series of payments to Matthew totaling over \$140,000 from 2015 to 2019 that she characterizes as rent for use of the Property. Matthew does not dispute that Victoria paid the maintenance and carrying costs on the Property. He further concedes he accepted \$140,000 but disputes that the sum constituted rent. He does not provide any additional information about these funds.

Matthew resided at the Property from the time of purchase through the first half of 2015 and for a brief period in 2018 (NYSCEF Doc No. 4 at ¶ 15, 19). Plaintiff alleges that repeated disputes arose as to Matthew’s use of the Property during his time residing there (Victoria

Cummock Affidavit at ¶¶ 24). In 2018 and 2019, Victoria and Matthew discussed selling the Property and dividing the sale proceeds among them following their alleged disputes. In at least two emails to his mother during these discussions, Matthew suggested that he take one third of the proceeds (NYSCEF Doc Nos. 17, 18). A sale never took place. On March 30, 2020, Victoria transferred her interest in the Property to the M. Victoria Cummock Trust (NYSCEF Doc. No. 13, “Transfer Deed”). Plaintiff then commenced the present action in August 2020, seeking a partition, judicial sale, and a division of sale proceeds pursuant to an accounting of the parties’ respective contributions, which Plaintiff contends entitles her to two-thirds of the value.

Plaintiff now moves pursuant to CPLR 3212(e) for an order (1) granting summary judgment on her claim for partition and entering an interlocutory judgment directing judicial sale of the Property; (2) appointing a referee to oversee the judicial sale pursuant to the terms of the interlocutory judgment, the accounting of expenses of the Property, and the distribution of the sales proceeds; (3) declaring that Plaintiff’s equitable share of the Property is two-thirds and Matthew’s is one-third; and (4) declaring that Matthew was never ousted from the Property. Matthew opposes the motion insofar as it would declare Plaintiff’s equitable share of the Property to be two-thirds and Matthew’s share one-third but otherwise consents to the relief sought, including a sale of the Property. Accordingly, the unopposed branches will be granted.

Plaintiff maintains that she is entitled to a declaration that her equitable share is two-thirds because Victoria, individually and through her trust, paid two-thirds of the Property’s purchase price, at least two-thirds of the Property’s maintenance and carrying costs, and over \$140,000 in rent to Matthew for the property between 2015 and 2019. Plaintiff further maintains that Matthew represented in his emails to Victoria that he understood his share to be one-third and her share to be two-thirds. Matthew disputes the portrayal of the \$140,000 payments as rent

and characterizes his email statements as attempts to settle the dispute rather than legal admissions of his interest in the Property. Matthew contends his equitable share is one-half because, he argues, Victoria's 2020 conveyance did not sever the joint tenancy.

While Victoria and Matthew purchased the property as joint tenants with right of survivorship, the conveyance of Victoria's interest in the Property to the M. Victoria Cummock Trust severed the joint tenancy (*see* RPL § 240-c[1][a] ["[A] joint tenant may unilaterally sever a joint tenancy in real property . . . by . . . [e]xecution and delivery of a deed that conveys legal title to the severing joint tenant's interest to a third person"]). Consequently, Plaintiff and Matthew each own one-half interest of the Property as tenants in common.

However, in a partition action, a tenant in common may present evidence that it paid a greater share of a property's purchase price and subsequent carrying costs than another co-tenant to rebut the presumption that the tenants in common have the same equitable share of the subject property (*Laney v Siewert*, 26 AD3d 194 [1st Dept 2006]). The question of a tenant in common's equitable share of a partitioned property "is not amenable to resolution by summary judgment" because a court must consider various equities when making this determination (*Manganiello v Lipman*, 74 AD3d 667, 669 [1st Dept 2010]; *Laney*, 26 AD3d at 194-195, *citing Ranninger v Penser*, 306 AD2d 20 [1st Dept 2003]).

Although Plaintiff's evidence suggests that Victoria paid a greater share of the purchase price and the carrying charges on the Property, Plaintiff's motion for a declaration that she is entitled to two-thirds of the sale proceeds upon the Property's sale must be denied. This issue "should be resolved at a hearing before the trial court, where upon the evidence, the trial court can adjust the equities and distribute the proceeds accordingly" (*Manganiello*, 74 AD3d at 669, *citing McVicker v Sarma*, 163 AD2d 721, 722 [3d Dept 1990]).

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment seeking partition and sale of the Property located at 60 Riverside Boulevard, #1202, New York, NY 10069 is granted; and it is further

ADJUDGED that Plaintiff and Defendant are tenants in common of the Property; and it is further

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

ORDERED AND ADJUDGED that neither party was ever ousted from the Property; and it is further

ORDERED AND ADJUDGED that Plaintiff's motion for an order declaring Plaintiff's equitable share in the property to be two-thirds and Defendant's share to be one-third is denied and the action shall be set down for a non-jury trial to determine the parties' equitable shares in the Property; and it is further

ORDERED that an accounting and sale shall be conducted by and under the direction of a Referee, to be appointed by separate order; and it is further

ORDERED that the parties are directed to appear for a Pre-Trial Conference on June 14, 2022, at 9:30 am.

This constitutes the Decision and Order of the Court.

LORI SATTLER, J.S.C.

5/19/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE