

Newburgh Realty II, LLC v IPA Asset Mgt. LLC
2023 NY Slip Op 35108(U)
June 7, 2023
Supreme Court, Suffolk County
Docket Number: Index No. 600124/2023
Judge: James Hudson
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Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

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NEWBURGH REALTY II, LLC,

Plaintiff,

-against-

IPA ASSET MANAGEMENT LLC; ISLAND PROPERTIES & ASSOCIATES, LLC and "JOHN DOE #1 through JOHN DOE #10", the last two names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.
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MOT. SEQ. NO.: 001 – MD

SUNSHINE, ISSACSON & HECHT, LLP
Attorneys for the Plaintiff
390 N. Broadway, Suite 200
Jericho, NY 11753

ROSENBERG, CALICA & BIRNEY, LLP
Attorneys for Defendants IPA Asset Manager
Island Properties & Associates, LLC
100 Garden City Plaza, Suite 408
Garden City, NY 11530

The Defendants, IPA Asset Management LLC and Island Properties & Associates LLC ("Defendants") request an Order pursuant to **CPLR 3211 (a) (1), (3), (7)**, dismissing the complaint in its entirety.

This is an action for partition and sale of commercial real property which address is 1140 Flanders Road, Riverhead, New York ("Premises"). The complaint alleges that the Premises is held as tenants-in-common by the Plaintiff and Defendant IPA Asset Management, LLC ("IPA"). The ownership of the Premises is in dispute. The Premises is improved by a 20,000 sq. ft. building. At the December 27th, 2018 Closing of Title, Plaintiff Newburgh Realty II, LLC ("Newburgh") purchased a Sixty-Six (66%) percent interest in

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and to the Premises from Defendant/Seller Island Properties & Associates, LLC ("Island"). The remaining Thirty-Four (34%) percent interest in and to the Premises was purchased by Defendant IPA. IPA and Island share a common principal, David DeRosa. The total sale price was \$1,200,000.00. Newburgh paid \$792,000.00 to Island for the two-thirds ownership interest. The HUD-1 and Closing Statement report that payment was made by a combination of \$542,127.27 in 1031 Exchange Proceeds and an additional payment of \$249,872.73 (HUD-1 Statement, Closing Statement Doc. 21). A copy of the executed Bargain and Sale Deed has been filed ("Deed", Doc. 22). Newburgh and IPA hold title as tenants-in-common. The Deed is signed by David DeRosa. It is not dated, witnessed, or acknowledged. The Deed was never recorded in the chain of title with the Suffolk County Clerk's Office in Riverhead, NY. The Premises has not been transferred or sold to a subsequent purchaser for value. Plaintiff's principal, Brian Schuman, alleges that, in December 2022 he discovered a newspaper article which reported that IPA was negotiating to sell the Premises to the Town of Southampton (Southampton Press, August 28th, 2022, Doc. 30). Mr. Schuman alleges that IPA's principal, David DeRosa, negotiated that sale without his knowledge or consent. The Plaintiff has filed the instant action for Partition; requesting that the Premises be sold. The Plaintiff also requests an accounting for all rents and profits adjusted against expenses for property taxes, repairs and maintenance from the proceeds of sale. The Defendants have filed a motion to dismiss the complaint (seq. no. 001) based upon documentary evidence, lack of capacity to bring this action, and for failure to state a cause of action.

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The case is in its preliminary stages. Discovery has not yet commenced. It is uncontroverted that the principals, Messrs. Schuman and DeRosa, have and continue to be involved in various real estate transactions with each another. Plaintiff's counsel, in his opposition, includes copies of complaints, decisions and orders in three (3) other active cases. Two of the cited are before this Court: *IPA Asset Management LLC. v. Brian Schuman, et al.*, Index no. 605520/2020; *Brian Schuman et al. v. David DeRosa et al.*, Index no. 602597/2021. The third is pending in Nassau County, *Mangotree Real Estate Holding, L.P. and Opportunity Zone RE 2019, LLC v. David DeRosa et al.*, 601314/2021. The noted cases demonstrate the history of business dealings between Mr. DeRosa and Mr. Schuman. Each alleges misconduct and breach of duties similar to those complained of in the case at bar (*see Becher v. Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *Apple Records, Inc. v. Capitol Records, inc.*, 137 AD2d 50, 527 NYS2d 279 [1st Dept 1988]). Such allegations require a hearing where the parties have the opportunity to present evidence; and are not conducive to a preliminary motion to dismiss (*Simar Holding Corp. v. GSC*, 87 AD3d 688, 690, 928 NYS2d 592 [2d Dept 2011]).

The Court is aware of the history and business interactions of the litigants. Each case must be decided upon its own unique merits and facts (*David v. #L1 Marketing Service, Inc.*, 113 AD3d 810, 812, 979 NYS2d 375 [2d Dept 2014]).

In deciding the instant motion to dismiss, the Court will not consider whether the Plaintiff's case will survive a later motion for summary judgment, or whether the Plaintiff will ultimately be able to prove its claims (*Redwood Property Holdings, LLC v. Christopher*, 211 AD3d 758, 177 NYS3d 895 [2d Dept 2022]).

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The Court will first consider the Defendants' request for relief based upon documentary evidence (CPLR 3211 [a] [1]). To succeed, the Defendants must demonstrate that the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the Plaintiff's case (*B&A Realty Management, LLC v. Gloria*, 192 AD3d 851, 144 NYS3d 443 [2d Dept 2021]; *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38, 827 NYS2d 231 [2d Dept 2006]).

The Court must consider whether the documentary evidence submitted, or its absence, utterly refutes the factual allegations of the complaint and conclusively establishes a defense as a matter of law (*Big Blue Products, Inc. v. Arila*, 187 AD3d 1118, 1118, 131 NYS3d 621 [2d Dept 2020]; see *Leon v. Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]). The documentary evidence must be unambiguous and of undisputed authenticity (*Minchala v. 829 Jefferson, LLC*, 177 AD3d 866, 867, 114 NYS3d 377 [2d Dept 2019]). The Court will consider documents such as contracts and any other papers of undeniable content; including deeds and contracts of sale (*Hohwald v. Farm Family Casualty Insurance Company*, 155 AD3d 1009, 1010, 66 NYS3d 316 [2d Dept 2017]; *Fontanetta v. John Doe I*, 73 AD3d 78, 84-85, 898 NYS3d 569 [2d Dept 2010]). The Court will not consider letters, emails, and affidavits, which fail to meet the requirements for documentary evidence (*Magee-Boyle v. Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 117, 1159, 105 NYS3d 90 [2d Dept 2019]).

The documentary evidence presented in this matter includes the closing documents; most importantly the Bargain and Sale Deed (Doc. 2).

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The Defendants argue that the lack of attestation and witness signatures renders the Deed invalid.

It is a matter of longstanding law that a deed which is neither acknowledged or attested by a subscribing witness is valid as between the parties and is effective at the time of execution (*Wood v. Chapin*, 13 NY 509, 3 Kern 509 [1856]).

Mr. DeRosa argues that the Deed was never filed nor delivered to Mr. Schuman; therefore, no transfer of ownership to the Plaintiff was effectuated (Doc. 10, para 12).

The Defendants fail to explain how the Plaintiff, to whom they allege the Deed was never delivered, came to possess that document; which the Plaintiff has filed as Exhibit “A” to the complaint.

Recordation and delivery are not synonymous. Delivery is the act of the grantor, [Island]. Acceptance is the act of the grantee, [Newburgh]. Recordation merely creates a rebuttable presumption of acceptance (**RPL 291**; see *Buszozak v. Wolo*, 125 Misc 546, 555-556, 211 NYS 557 [Sup Ct Jefferson County 1925]).

Mr. Schuman asserts that, during January 2019, Dominick Callegari, Esq., the attorney who had closed title during December 2018, provided him with a copy of the Deed. He also states that he presumed that the original Deed was not presented to him at that time because it was being sent for recordation (Doc. 15, para. 8).

The failure to properly record a deed is insufficient to overcome the presumption that the deed was delivered, since recording is not required in order to transfer title to real property (*In re Humann*, 136 AD3d 1036, 1037, 26 NYS3d 304 [2d Dept 2016]).

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The Deed is documentary evidence. As tenant-in-common to the Premises, the Plaintiff may maintain an action for Partition. The filing is unaffected by any limitations period so long as the co-tenancy exists (*Rokeach v. Zaltz*, 112 AD2d 209, 209, 491 NYS2d 428 [2d Dept 1985]). The Defendants' request that the complaint be dismissed pursuant to **CPLR 3211 (a) (1)** is not supported by the case documents.

The Court will next consider the Defendants' request that the complaint be dismissed due to the Plaintiff's lack of standing to bring this action. The Defendants cited to **CPLR 3211 (a) (3)** in support of the instant motion. That subsection addresses the lack of legal capacity to sue; not standing. The former concerns justiciability, the latter concerns a litigant's power to appear and bring the grievance before the Court (*Community Board 7 of the Borough of Manhattan v. Schaffer*, 84 NY2d 148, 155, 615 NYS2d 644, 639 NE2d 1 [1994]). Standing relates to an assurance that the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial determination. Standing relates to whether a party has suffered an injury (*Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 772-773, 570 NYS2d 553, 655 NE2d 649 [1995]).

Newburgh has demonstrated by documentary evidence that it is a tenant-in-common in the Premises, and thereby has the requisite stake in the outcome to assert standing to file the instant matter and obtain a Judicial determination on its claim.

Finally, the Defendants request that the complaint be dismissed pursuant to **CPLR 3211 (a) (7)**, for failure to state a cause of action. The Court must afford the pleadings a liberal construction, accept the facts alleged in the complaint as true, and accord the

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Plaintiff every possible favorable inference that the complaint states any viable cause of action. The criterion is whether the Plaintiff has a cause of action, not whether one has been stated (*Leon v. Martinez*, 84 NY2d 83, *supra*. at 88; *Maddicks v. Big City Properties, LLC*, 34 NY3d 116, 123, 114 NYS3d 1, 137 NE3d 456 [2019]). The Court will only consider whether the allegations support any cognizable legal theory (*Connolly v. Long Island Power Authority*, 30 NY3d 719, 728, 70 NYS3d 909, 94 NE3d 471 [2018]). The Court will also consider whether the Plaintiff can succeed upon any reasonable view of the stated facts (*Aristy-Farar v. State*, 29 NY3d 501, 509, 59 NYS3d 877, 81 NE3d 360 [2017]). Dismissal will only be warranted provided an asserted material fact is not a fact and no significant dispute exists regarding that fact (*Houtenbos v. Fordune Association, Inc.*, 200 AD3d 661, 160 NYS3d 57, 61 [2d Dept 2022]).

On a motion to dismiss, the Plaintiff has no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 AD2d 455, 456, 745 NYS2d 72 [2d Dept 2002]). Under New York Law, joint tenancies may be severed by the court-ordered partition of the property that adjusts the rights of the parties and directs that it be sold. The equitable remedy of partition may be sought by the Plaintiff as a tenant-in-common. The sale of the premises is permitted where it appears that actual partition cannot be made without great prejudice to the owners (*Trotta v. Ollivier*, 91 AD3d 8, 13, 933 NYS2d 66 [2d Dept 2011]). The Plaintiff, as tenant-in-common, has adequately plead its causes of action for Partition and an Accounting. The two (2) causes of action are legally sufficient (*Paulsen v. Paulsen*,

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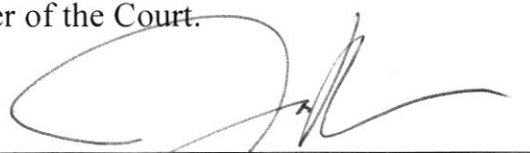
148 AD2d 685, 686, 539 NYS2d 433 [2d Dept 1989]). Defendants' motion cannot be granted for failure to state a cause of action.

Accordingly, it is

ORDERED, that the motion (seq. no. 001) by the Defendants, IPA Asset Management LLC and Island Properties & Associates LLC, which requests, pursuant to **CPLR 3211 (a) (1), (3), (7)**, dismissal of the complaint, is denied.

This memorandum also constitutes the Order of the Court.

Dated: June 7th, 2023
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court