

Feneque v Feneque

2024 NY Slip Op 34076(U)

November 12, 2024

Supreme Court, New York County

Docket Number: Index No. 159468/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

JASON FENEQUE,

Plaintiff,

- v -

SAMUEL FENEQUE,

Defendant.

-----X

INDEX NO. 159468/2022

MOTION DATE 10/19/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion for partial summary judgment is granted, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 11-13, 37-38) and the exhibits attached thereto, in which the court concurs, as summarized herein.

The parties are tenants in common of the property located at 36 East 126th street, New York, New York (the “premises”). Plaintiff commenced this action seeking a judgment of partition and sale of the property pursuant to RPAPL 901, and an accounting between the parties regarding their expenditures related to the premises. Plaintiff now moves for summary judgment directing the partition and sale, and the related accounting, and dismissing the counterclaims and affirmative defenses alleged by defendant.

“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” (RPAPL 901 [1]). “[A] party, jointly owning property with another,

may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property” (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]). A plaintiff establishes prima facie entitlement to summary judgment by proof of ownership, right to possession, and that physical partition alone is not possible without great prejudice (*id.*). It is presumed that the parties shall share equally in the proceeds following partition, that presumption may be rebuttable with proof as to which party paid the expenses related to maintenance and upkeep of the property (*id.* at 669; *Laney v Siewert*, 26 AD3d 194 [1st Dept 2006]).

Here, it is undisputed that the parties are tenants in common of the premises (deed, NYSCEF Doc. No. 3). Further, plaintiff attests that the premises, a multifamily building, cannot be physically partitioned without prejudice to the parties (Jason Feneque aff., NYSCEF Doc. No. 12, ¶ 6). Defendant offers no opposition to this point. Plaintiff has, therefore, established entitlement to summary judgment of partition and sale. The parties do not dispute the necessity of an accounting, and an accounting is necessary to determine the division of the profits of the sale (RPAPL 945 [“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”]; *Manganiello*, 74 AD3d at 669 [“For the foregoing reason, plaintiff is also entitled to an accounting”]).

Defendant’s affirmative defenses and counterclaims are subject to dismissal. Defendant’s assertions that he was not properly served and the court lacks jurisdiction over him have been waived, as he failed to seek dismissal on such ground within 60 days of filing the answer (CPLR 3211 [e]). The remaining alternative defenses are pleaded in conclusory fashion and without supporting factual allegations (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept

1996]) (“bare legal conclusions are insufficient to raise an affirmative defense”). As to the counterclaims, defendant invokes various statutory and common law defenses and miscellaneous legal concepts but does not plead any factual allegations or explain how any of the things he raises constitutes a cause of action (*Orenstein, Snitow, Sutak & Pollack, P. C. v Chazen*, 73 AD2d 851, 851 [1st Dept 1980] [“Nothing having been presented to indicate existence of an issue to be tried, the motion should have been granted”]). While defendant correctly states that plaintiff failed to timely reply to the counterclaims, and plaintiff provides no excuse for this failure, a motion to dismiss for failure to state a cause of action may be made at any time (CPLR 3211 [e]). The counterclaims in this case are facially deficient, obviating plaintiff’s failure to properly respond.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment is granted. The parties are directed to settle an interlocutory judgment of partition and sale on notice; and it is further

ORDERED that, a long-form accounting being necessary to determine whether either party is entitled to reimbursement for maintenance and upkeep of the premises, the remainder of the action is severed and shall continue; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on December 4, 2024, at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court’s form Commercial Division Preliminary Conference Order located at https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:



<u>11/12/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input checked="" type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER
	<input type="checkbox"/>		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/> REFERENCE