SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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2231 ASSOCIATES LLC, GEM 2231, LLC

Plaintiffs,

- v -

ZKZ 2231 LLC,

Defendant.

INDEX NO. 155424/2022

MOTION DATE 08/08/2022, 08/08/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 54, 60
were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 34, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 61
were read on this motion to DISMISS COUNTERCLAIMS.

This action involves a dispute among co-owners of real estate located in the Upper West Side of Manhattan. In 1979, a New York corporation controlled by Stanley Zabar, his brother Saul Zabar, and their business partner Murray Klein, purchased the property identified as Block 1227; Lots 54 and 59 (2231 Broadway, New York, NY 10024 [the "Property"]) together with real-estate investors and developers Lawrence and Melvin Friedland. The Property is held by the Friedland and Zabar/Klein families, via corporate entities, as tenants in common. The Friedlands' interest is held by 2231 Associates LLC ("Associates") and GEM 2231, LLC ("GEM" [together with "Associates," the "Plaintiffs"]), with each holding a 25% stake in the property. The Zabar/Klein's 50 percent interest is held by Defendant ZKZ 2231 LLC ("ZKZ" or "Defendant").

As described below, the Friedland entities wish to sell the existing two commercial structures on the Property and pursue construction of a larger residential building. The Zabar entities, which use the smaller of the two buildings in connection with their nearby well-known food business, object to the Friedlands' plans and wish to retain the use of the smaller building. In this action, Plaintiffs (the Friedland entities) seek a Court-ordered partition and sale of the Property pursuant to Section 901(1) of the New York Real Property Actions and Proceedings Law as well as an accounting (NYSCEF 3 ["Compl."]; NYSCEF 4 [Ex. 1]). In response, the Defendant (the Zabar/Klein entity) contends, among other things, that the Plaintiffs have purposely mismanaged the Property in the hopes of forcing Defendant into agreeing to a proposed residential development that the original joint purchasing family members agreed not to pursue.

Plaintiffs now seek summary judgment granting their claim for partition and sale of the buildings and an accounting, and summary judgment dismissing Defendant's affirmative defenses asserting unclean hands and failure to state a claim (NYSCEF 5 [Answer with Counterclaims ("Answer")])[1] (Mot. Seq. 001). Plaintiffs also move to dismiss Defendant's counterclaims for (1) specific performance of an alleged oral agreement to not use the Property for residential development; (2) an accounting; and (3) breach of fiduciary duty (Mot. Seq. 002). Defendant opposes both motions.

For the following reasons, Plaintiffs' motion for summary judgment is denied, and their motion to dismiss is granted in part. In a nutshell, there are legitimate questions of fact as to

[1] Defendant also asserted a defense that that the Property is not subject to partition because it is Heirs Property under the Uniform Partition of Heirs Property Act (RPAPL §993). However, Defendant abandoned that contention at oral argument, and thus this affirmative defense is dismissed.

whether Plaintiffs' proposed partition and sale of the parties' jointly owned lots is an appropriate equitable remedy. Defendant maintains that partition is unnecessary (with proper management) and that, even if partition ultimately is the best option, it should be accomplished by physical partition of the two lots with a financial adjustment to ensure that each side gets equivalent value rather than by partition and sale. The disputed factual record does not permit a conclusive finding either way at this stage.

BACKGROUND

The Property consists (NYSCEF 4 [Ex. 1]) consists of two separate adjoining buildings: (i) a large commercial building fronting on the southwest corner of Broadway and West 80th Street (the "larger building" or Parcel 1), which was once the home of the New York School of Fine and Applied Arts, and (ii) a smaller three-story building (250 West 80th Street) fronting on West 80th Street (the "smaller building" or Parcel 2) which was historically used as a garage and warehouse (NYSCEF 36 ["Zabar Aff."] ¶4).

Stanley and Saul Zabar were interested in the Property because of its proximity to the Zabar's flagship store and the possibility that they could use the two buildings on the Property to further expand Zabar's gourmet food business. They also believed that they could rent the office space in the larger building and thereby maintain its historical character[2] (Zabar Aff. ¶5).

Stanley and Saul approached their friend Lawrence Friedland to see if they could work together on the project as partners (Zabar Aff. ¶6). According to Defendant, both parties agreed that they were not interested in residential development because of rent regulation issues that

[2] The larger building, commissioned in 1905, was initially known as the Broadway Studio Building. The major tenant was the New York School of Art. Offices were leased to musical tenants and artists. In 1942, the upper floors were renovated to accommodate the Robert Louis Stevenson School (*see* NYSCEF 38).

came with such projects (*id.*). After some further discussion, the parties mutually agreed to work together to buy the Property, with the express understanding (according to the Zabars) that the Property would not be developed for residential use as long as the Friedland and Zabar families controlled the Property, meaning that the Property would be used solely for commercial purposes (Answer ¶38).

Stanley Zabar, his brother Saul, and their business partner Murray Klein took title to their interests in the Property in the name of Broadway & 80th Realty Corp., a passthrough nominee subchapter S corporation (*see* NYSCEF 39). Lawrence and his brother Melvin placed title in their interests in their own names, but later transferred their interests to entities which they controlled, *i.e.*, the Plaintiffs (Zabar Aff. ¶7). In October 1986, Stanley, Saul, and Murray Klein, transferred their 50% interest in the Property to a limited partnership controlled by the Zabar and Klein families (ZKZ Associates, L.P.). In 2016, the partners of ZKZ Associates, L.P. agreed to transfer their interests in the Property to Defendant, ZKZ 2231 LLC, a limited liability company (*id.*).

Since 1979 the Zabars and the Friedlands have operated the Property solely for commercial purposes (Answer ¶38). The smaller building has been used for the operation of the Zabar's retail and mail order business (*id.* ¶39). Defendant submits that from the time they first started using the smaller building for Zabar's, they agreed with Lawrence Friedland to lease the smaller building at a market rent. Defendant also obtained the necessary approvals with respect to its use of the building from the City of New York, Department of Buildings (Zabar Aff. ¶11).

Defendant submits that it has spent more than $1.5 million on upgrades and improvements on the smaller building in reliance on the Agreement. As part of its efforts to build the Zabar's catalogue and online business, Defendant made numerous upgrades to the

smaller building, including replacing wooden columns, purchasing walk-in refrigerators, and installing bathrooms, building alarms, heating systems, stairways, HVAC systems, sprinkler systems, lighting, doorway upgrades, telephone systems, intercom systems, concierge bells, and a new façade. The smaller building has a street-level operation ability that Defendant submits is essential to the warehouse and mail order business of Zabar's (Zabar Aff. ¶¶12-13). Zabar's catalogue and online business has become a successful part of its overall business and now represents almost 25% of its gross revenue (*id.* ¶14).

According to Plaintiffs, over the last several years, there has been significant interest in redeveloping the Property to maximize its economic value (Compl. ¶20). Plaintiffs have engaged in discussions with Defendant to reach a commercially desirable outcome with respect to redeveloping the Property, but Defendant purportedly has refused to engage in meaningful discussions (*id.* ¶21). Plaintiffs allege that as a result, joint ownership of the Property between the parties is no longer desirable or workable (*id.* ¶23). According to Plaintiffs, the Property should be sold rather than physically partitioned because the lots are of disparate size and street frontage, such that the result would be portions with unequal monetary values (NYSCEF 10 ["Friedland Aff."] ¶¶15-18).

According to Defendant, in 2016 William Friedland (Lawrence's son) determined that he wanted to develop the Property as a mixed-use residential tower (Answer ¶40). Defendant considered the idea but determined that the plan was (i) risky, (ii) could be opposed by the surrounding neighborhood, (iii) could potentially injure the Zabars' retail operation, (iv) could injure Zabar's reputation, and (v) that the potential return on the required investment would likely be approximately equal to the then current return on the Property without the additional investment and risk (*id.* ¶41).

Defendant alleges that Stanley Zabar approached Lawrence Friedland and confronted him with the fact that residential development was contrary to their earlier oral agreement – in place for 35 years – to forego residential development and that, given the historically profitable return on the Property, there was little justification for changing course (Answer ¶42; Zabar Aff. ¶19). According to Mr. Zabar, Lawrence confirmed the existence of the earlier agreement but said that William Friedland was now making the decisions and that he (Lawrence) would therefore not be able to abide by the prior agreement (*id.* ¶42).

Defendant further alleges that the Friedlands have managed the Property since 1979, charging 2 percent and then 3 percent of the gross rents for their real estate management services (Answer ¶46; Zabar Aff. ¶17). They assert the Property has been profitable, but over the last several years the gross income of the property has declined substantially (Zabar Aff. ¶16). Specifically, according to Defendant, sometime after 2010, the Plaintiffs began to intentionally vacate commercial tenants in the building on the Property at 2231 Broadway without the consent or permission of the Defendant (*id.* ¶47). Specifically, Defendant alleges that Plaintiffs induced a long-time tenant at Lot 54 (2231 Broadway), a Verizon entity, not to exercise an option to extend its lease at 2231 Broadway by representing that the building at 2231 Broadway would soon be demolished and then negotiated a new lease with that tenant for space at 2234 Broadway, a building owned and controlled by the Friedland family. Defendant alleges that the Plaintiffs have done nothing to re-let the retail space vacated by the Verizon entity.

Defendant also alleges that Plaintiffs demanded that Defendant agree to the early termination of a profitable lease with the New York Health Club at Lot 54 (2231 Broadway) pursuant to Plaintiffs' desire to vacate the Property so that the two buildings could be demolished and developed for a mixed-used, residential tower (*id.* ¶¶48-50). Defendant alleges that over the

last few years, many of the offices in the Property have remained vacant due to Plaintiffs' desire to facilitate demolition and development, and that these actions have been calculated to benefit the interests of the Plaintiffs, cause financial injury to the Defendant, and violate their fiduciary obligations and duty of loyalty to the Defendant as co-owners (*id.* ¶¶51-52).

DISCUSSION

I. Plaintiffs' Motion for Summary Judgment

A party that jointly owns property with another may "seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property" (RPAPL § 901[1]). However, "[t]he right to partition is not absolute, … and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties" (*Clarke v Clarke*, 227 AD3d 659, 661 [2d Dept 2024]; *see also Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; *Gabay v Bender*, 24 AD3d 133 [1st Dept 2005]; *Cruz v Cruz*, 213 AD3d 805, 807 [2d Dept 2023]; *James v James*, 52 AD3d 474, 474 [2d Dept 2008]; *Graffeo v Paciello*, 46 AD3d 613, 614 [2d Dept 2007]; *Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002]; *Stressler v Stressler*, 193 AD2d 728, 728 [2d Dept 1993]; *Ripp v Ripp*, 38 AD2d 65, 68 [2d Dept 1971], *affd,* 32 NY2d 755 [1973]; *Moses v Moses*, 170 AD 211, 217 [1st Dept 1915]).

"As the equities of the co-tenants may arise from a great variety of circumstances, it follows that the assertion of these equities necessarily introduces into partition suits a great variety of issues" (*Ripp*, 38 AD2d at 68). In sum, "'[p]artition is an equitable remedy in nature and [the] Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits'" (*Khotylev v Spektor*, 165 AD3d 1088, 1089 [2d Dept 2018] [citations omitted]).

A plaintiff establishes a prima facie right to partition and sale "by establishing that 1) the parties own the building as tenants in common and 2) physical partition of the property would come at great prejudice to the owners" (*MurrayRayeDebbie, LLC v Rosenphil LLC*, 172 AD3d 615 [1st Dept 2019]). Pursuant to RPAPL 915, before a partition or sale may be directed, a determination must be made as to the rights, shares, or interests of the parties, and whether partition may be had without great prejudice. Any such findings are to be included in an interlocutory judgment of partition, along with either a direction to sell at public auction or a direction to physically partition the premises. Where actual partition is directed, the Court shall designate "three reputable and disinterested freeholders as commissioners to make the partition so directed" (RPAPL 915).

A. Right to Partition

As to the first step—establishing the right to seek partition—Plaintiffs have established their joint ownership (RPAPL 901[1]). It is undisputed that the Property is owned by the parties as tenants-in-common, and that ZKZ owns 50 percent of the Property, GEM owns 25 percent of it, and Associates owns the remaining 25 percent (Compl. ¶¶ 10-13; Answer ¶¶ 10-13; Friedland Aff. ¶¶ 8-9, Exs. 4, 5).

In response, Defendant has raised issues of fact as to whether the equities favor Plaintiffs' proposed partition (*see Arata v Behling*, 57 AD3d 925, 926 [2d Dept 2008]), which renders summary judgment inappropriate. Specifically, Defendant has raised a triable issue of fact as to whether Plaintiffs have "unclean hands," which New York courts have held can be a defense to the equitable remedy of partition (*Kopsidas*, 294 AD2d at 407; *Vasquez v Zambrano*, 196 AD2d 840, 840 [2d Dept 1993] ["Because both parties had unclean hands in connection with the purchase of this house, they are both barred from all equitable relief"; partition denied]; *Pachter*

v 3063 Brighton 8 Properties LLC, 69 Misc 3d 1201(A) [Sup Ct, King's County 2020] ["'[U]nclean hands is a defense to the equitable remedy of partition.'"] [citation omitted]).[3]

"The doctrine of unclean hands applies when the complaining party shows that the offending party is 'guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct'" (*Kopsidas*, 294 AD2d at 407). The First Department has held that "[w]here a plaintiff has committed breaches of fiduciary duties owed to a defendant, the doctrine of unclean hands applies to bar such plaintiff from seeking relief on his or her equitable claims" (*Ross v Moyer*, 286 AD2d 610, 611 [1st Dept 2001]; *Cohen v Katz*, 242 AD2d 448, 448 [1st Dept 1997]). Moreover, "[a]s tenants in common, the parties have a quasi-trust or fiduciary relation with regard to the property they commonly hold" (*Pichler v Jackson*, 157 AD3d 450, 450 [1st Dept 2018]; *see also Rozenberg v Perlstein*, 200 AD3d 915 [2d Dept 2021] ["tenants in common have a quasi-trust or fiduciary relation with regard to the property they commonly hold"]; *Thayer v Leggett*, 229 NY 152, 155 [1920] ["The case of tenants in common coming into joint possession of real estate as co-heirs or co-devisees, has always been spoken of as creating special obligations between the joint owners"]; *Pokoik v Pokoik*, 115 AD3d 428, 430 [1st Dept 2014] ["Even if []the business judgment rule could be applied to a tenancy-in-common, it 'does not protect . . . corporate fiduciaries when they make decisions affected by inherent conflict of interest'"]; *Snyder v Puente De Brooklyn Realty Corp.*, 297 AD2d 432, 435

[3] *Grossman v Baker*, 182 AD2d 1119, 1119 [4th Dept 1992] and *Jones v Gabrielli*, 6 AD2d 542, 543 [3d Dept 1958], upon which Plaintiffs rely, appear to be outliers in suggesting that unclean hands is not a viable defense to partition (*see* 24 NY Jur 2d Cotenancy and Partition § 142 ["Although there is authority to the contrary (citing *Grossman*), it has been said that unclean hands is a defense to the equitable remedy of partition"]).

[3d Dept 2002] [holding that the supreme court's finding of that a "confidential, fiduciary relationship exists between cotenants" was sound]).

Here, not only were Plaintiffs co-tenants with Defendant, but Defendant avers that Plaintiffs are sophisticated real estate investors and developers that managed the Property for the joint benefit of the co-owners (Defendant being a food company, not a real estate company). These assertions, if proven, can give rise to a fiduciary relationship between Plaintiffs and Defendant (*Birnbaum v Birnbaum*, 73 NY2d 461, 467 [1989] [finding that regardless of whether a fiduciary duty arose due to the parties being partners, joint venturers, or tenants in common, under any of these designations, it was clear there was a fiduciary duty owed]).

In this case, Defendants assert that Plaintiffs have willfully mismanaged the larger building to drive out tenants by unilaterally denying new leases, luring tenants across the street for Plaintiffs' own benefit, attempting to terminate leases early, and failing to find new tenants—all in effort to lower the price of the Property at a potential forced partition sale in which Plaintiffs would attempt to buy back the property at a discount for real estate development, resulting in a windfall for Plaintiffs. These allegations, if proven, raise viable questions of unclean hands and breach of fiduciary duty. Therefore, summary judgment on the threshold issue of partition is denied.

B. Partition by Sale

Plaintiffs have also failed to demonstrate that the Court should order partition by sale over physical partition. "The actual physical partition of property is statutorily authorized as the preferred method and is presumed appropriate unless one party demonstrates that physical partition would cause great prejudice to the owners, in which case the property must be sold at public auction" (*Snyder Fulton St., LLC v Fulton Interest, LLC*, 57 AD3d 511, 513 [2d Dept

2008]; *see also Hales v Ross*, 89 AD3d 1261, 1263 [3d Dept 2011]). "Whether physical partition or sale is appropriate is a question of fact" (*Snyder Fulton St.*, 57 AD3d at 513). "The burden is on the party opposing physical partition to demonstrate 'great prejudice'" (Practice Commentaries: RPAPL 915). "[E]very dispute of this kind must be resolved upon its own facts and surroundings and the equities of each cotenant must be taken into account" (*Vlcek v Vlcek*, 42 AD2d 308, 310 [3d Dept 1973]).

To support its argument that physical partition of the property would come at great prejudice to the owners, Plaintiffs submit the affidavit of William Friedland, manager of Plaintiffs, who avers that "[a]lthough the Property consists of two lots—Block 1227, Lot 54 and Block 1227, Lot 59—it cannot be physically divided equally or equitably along the lot-lines" because "the lots are of disparate size and street frontage, such that the result would be portions with unequal monetary values" (NYSCEF 10 ¶¶17-18). Mr. Friedland further states that "[a] significant portion of the Property's value is derived from its size, and, thus, the Property must be kept intact to avoid prejudice to the owners" (*id.* ¶19).

In response, Defendant disputes Plaintiffs' assertion that physical partition would result in great prejudice to the parties here. Rather, if partition were to be granted, Defendant argues that physical partition is the appropriate remedy and that Defendant should be able to retain the smaller building with an economic adjustment if necessary to ensure the co-tenants receive equivalent value (*see infra* discussing RPAPL 943). Defendant argues that the smaller building is integral to Zabars' gourmet and online business, and that Defendant has spent considerable funds to transform and maintain the smaller building for their business, including obtaining certain zoning approvals. Defendant also emphasizes that the smaller building is directly across

from Zabars and it is highly unlikely that Defendant would be able to find new property in close proximity to Zabars.

In response, Plaintiffs argue that the proceeds from any sale of the property would be sufficient to cover any loss Defendant may suffer from losing the smaller building. While that may or may not be true, it only confirms that there are issues of fact as to the appropriate form of partition here (assuming partition is ordered). As noted, physical partition is the default remedy, and Plaintiff has not conclusively established that physical partition cannot be ordered here without inflicting prejudice on the owners. Notably, the cases upon which Plaintiffs rely involve situations in which physical partition would be impractical or nonsensical (*see Hitech Homes, LLC v Burke*, 159 AD3d 489 [1st Dept 2018] [property was a one-family dwelling]; *Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010] [property was a condominium unit]). By contrast, the Property at issue in this case is already divided into two lots.

The denial of Plaintiff's motion does not mean that there will not ultimately be partition in one form or another once everyone's interests are taken into account and discovery has been taken on the parties' various claims and defenses. The Court only finds that partition in the manner that Plaintiffs seek it—partition and sale of both buildings in a single transaction—cannot be granted summarily on this record. Moreover, Defendant is entitled to a hearing on its argument that partition could be handled by allowing Defendant to retain the smaller building, and either transferring the larger building to Plaintiffs or directing the larger building to be auctioned, with the proceeds distributed to ensure equal treatment to the co-owners (*see* RPAPL 943 ["Where it appears that partition cannot be made equal between the parties according to their respective rights without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition"]; Rasch,

New York Law & Practice of Real Property, 2d ed. § 40:38 [updated May 2024] ["Where the lands are not capable of the proper proportionate division without prejudice to the rights or interests of some of the parties, a part of the premises may be allotted to one party of greater value than the share to which it is entitled, and it may be compelled by the final judgment to pay money to others receiving less than their proper share, as compensation for its share"]).

II. **Plaintiffs' Motion to Dismiss Defendant's Counterclaims**

Defendants' counterclaim for anticipatory breach of the alleged oral agreement not to develop the property for residential use (First Counterclaim) is dismissed. Defendant alleges that "Plaintiffs have anticipatorily breached their agreement with the Zabar family by seeking to develop the Property residentially via this partition action" (Answer at ¶44). Even assuming Defendant's allegations regarding the purported oral agreement are sufficiently definite to survive a motion to dismiss, that the alleged agreement between Messrs. Lawrence Friedland and Stanley Zabar applies to the parties here (GEM, Associates, and ZKZ), *and* that the oral agreement is enforceable despite the Statute of Frauds, this counterclaim must be dismissed.

Simply seeking a partition, which is the right of a co-tenant, is not an anticipatory breach of the agreement. That relief, if granted, would be by order of the Court and not by the unilateral conduct of the Plaintiff. Although the Court has considered the oral agreement as part of the background facts in connection with this partition action, it does not give rise to an independent cause of action based on the facts alleged in this case.

By contrast, as discussed above, Defendant's third counterclaim for breach of fiduciary duty and second counterclaim for an accounting, which is dependent on the breach of fiduciary claim, are sufficiently pleaded (*Pichler*, 157 AD3d at 450 [finding that fiduciary relationship between tenants in common supported the claim for an accounting]). The allegations concerning

alleged acts to undermine the value of the co-owned property *prior to the partition action* can give rise to an independent cause of action and are not subsumed within the claim for a partition.

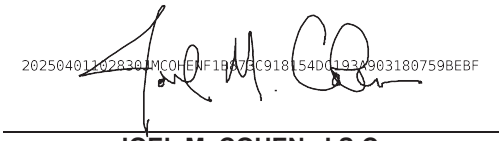
Accordingly, it is

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; it is further

ORDERED that Plaintiff's Motion to Dismiss Defendant's Counterclaims is **GRANTED** with respect to the First Counterclaim (anticipatory breach of contract) and is otherwise denied; it is further

ORDERED that the parties submit a proposed revised discovery schedule to the Court within fourteen (14) days of the date of this Order.

This constitutes the Decision and Order of the Court.



4/1/2024
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☒	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**