

Studstill v Leonart

2016 NY Slip Op 32291(U)

November 14, 2016

Supreme Court, New York County

Docket Number: 158812/2015

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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WILLIAM DAVID STUDSTILL,

Index No. 158812/2015

Plaintiff,

Mot. seq. no. 001

- against -

DECISION AND ORDER

RALPH A. LEONART, and JPMORGAN CHASE
BANK, NA,

Defendants.

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BARBARA JAFFE, J.:

For plaintiff:
Andrew B. Zinman, Esq.
Robinson Brog, et al.
875 Third Ave. 9th fl.
212-603-6300

For defendant Leonart:
Ralph A. Leonart, self-represented
55 Park Terrace East, Apt. B-71
New York, NY 10034

Plaintiff moves for an order granting him partial summary judgment on his claim for partition. Defendant Leonart opposes; defendant JPMorgan Chase takes no position.

I. APPLICABLE LAW

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition.

(*Winegrad*, 64 NY2d at 853).

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 901(1), a tenant in common “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.” With the exception of the partition of real property following a divorce decree, partition is “a matter of right” for one who no longer wishes to own property in common, absent “extreme prejudice to a co-owner.”

(*Chiang v Chang*, 137 AD2d 371, 373 [1st Dept 1988]; 3 NY Law & Prac of Real Property § 40:3 [2d ed., 2014] [“Partition is a matter of right, however inconvenient, or injurious, it may be.”]).

Nevertheless, courts observe that the right to partition is not “absolute”; equitable considerations may be considered. (See *eg.*, *Graffeo v Paciello*, 46 AD3d 613, 614 [2d Dept 2007], *lv denied* 10 NY3d 891 [2008]; *see generally* 24 NY Jur 2d Cotenancy and Partition § 129 [“the right to partition is absolute in the absence of countervailing conditions.”]).

A plaintiff establishes her right to summary judgment for partition and sale by demonstrating her ownership and right to possession of the property, and that physical partition cannot be made without great prejudice (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; *Donlon v Diamico*, 33 AD3d 841 [2d Dept 2006]; *Dalmacy v Joseph*, 297 AD2d 329 [2d Dept 2002]). Equitable defenses to partition cannot be based solely on “the adverse consequences which would befall [a] defendant if partition were ordered” (*Manganiello*, 74 AD3d at 668-669) or “the desire to maintain the status quo” (*Ferguson v McLoughlin*, 184 AD2d 294 [1st Dept 1992], *lv denied* 80 NY2d 972).

II. ANALYSIS

Here, plaintiff’s demonstration of his ownership and right to possess the property,

through submission of the UCC-1 Financing Statement, and the undisputed impracticability of physical partition, establishes as a matter of law his partition claim. (*See Pando v Tapia*, 79 AD3d 993, 995 [2d Dept 2010] [plaintiff entitled to summary judgment on partition claim by submitting deed establishing ownership and right to possession of property as tenant in common, and by demonstrating that defendant's right to exclusive possession under judgment of divorce had expired]). In addition to the Statement, Leonart authored emails to plaintiff contain admissions that plaintiff owns the apartment as a joint tenant (NYSCEF 26), and even if the emails were part of the parties' settlement negotiations, admissions of fact made during the course of the negotiations are admissible. (*See DSA Realty Svces., LLC v Marcus & Millichap Real Estate Investment Svces. of New York, Inc.*, 128 AD3d 587 [1st Dept 2015] [portion of letter at issue was not offer of settlement but admission of fact]).

Leonart's assertions that he paid more than plaintiff for the apartment, and has paid toward the mortgage, the maintenance, and associated apartment repairs and bills, and that he has lived full-time in the apartment since 2001 as his primary residence raise no triable issue. (*See Lane v Tyson*, 133 AD3d 530 [1st Dept 2015], *lv dismissed* 27 NY3d 1033 [2016] [plaintiff entitled to partition and sale of apartment, as record supported finding that parties were tenants in common, and defendant raised no triable issue to controvert assertion that apartment value maximized by remaining undivided or that parties would be prejudiced by dividing it]; *Manganiello*, 74 AD3d at 155 [plaintiff established *prima facie* entitlement to judgment by demonstrating his ownership and right to possess property, and that physical partition would greatly prejudice parties; defendant's claim that plaintiff never contributed to purchase of premises, that she solely contributed to property's maintenance, and that she continuously and

solely occupied premises failed to raise triable issue, such equitable considerations would only be relevant when distributing proceeds following sale]).

III. CONCLUSION

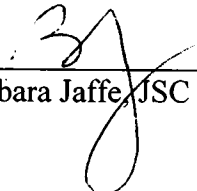
Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment for partition and for the sale of the property located at 55 Park Terrace East, Apartment B71, New York, New York 10034, Block 2243, Lot 0210, is granted; it is further

ORDERED, that the issue of ascertaining and computing the amount due to plaintiff and defendants upon a sale is referred to a Special Referee, who shall report to this court, and it is further

ORDERED, that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office, who is directed to place this matter on the calendar.

ENTER:



Barbara Jaffe, JSC

DATED: November 14, 2016
New York, New York