Lee v Gallaway
2006 NY Slip Op 30745(U)
February 17, 2006
Sup Ct, New York County
Docket Number: 102561/2005
Judge: Karen S. Smith

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

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JEANNE LEE A/K/A JEAN LEE-SINGLETON,

Index no.: 102561/2005

Plaintiff,

-against-

MATTHEW L. GALLAWAY, BANK OF AMERICA, the successor in interest to FLEET NATIONAL BANK, the CITY OF NEW YORK, acting by and through its DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and the CITY OF NEW YORK

Defendants.

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MATTHEW GALLAWAY,

Index no.: 105314/2005

Plaintiff,

-against-

JEANNE LEE-SINGLETON

Defendants.

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PRESENT: KAREN S. SMITH, J.S.C.:

Motion Sequence 001 of Index Number 105314/2005 ("Gallaway Action") and Motion Sequence 001 of Index Number 102561/2005 ("Lee-Singleton Action") are consolidated for the purposes of disposition in this order. In the Gallaway Action Motion Sequence, defendant Jeanne Lee-Singleton moves, pursuant to CPLR § 3211(a), to dismiss and plaintiff Matthew Gallaway cross-moves, pursuant to CPLR §§ 602 and 3212 to consolidate and for partial summary judgment. In the Lee-Singleton Action Motion Sequence, defendant Matthew Gallaway moves, pursuant to CPLR §§ 602 and 3212, to consolidate and for summary judgment dismissing the complaint and plaintiff Jeanne Lee-Singleton cross-moves, pursuant to CPLR § 3212, for summary judgment. In the Gallaway Action Motion Sequence, defendant Lee-Singleton's motion is granted in part and denied in part as

more fully set forth below, and plaintiff Matthew Gallaway's motion is granted in part and denied in part as more fully set forth below. In the Lee-Singleton Action Motion Sequence, defendant Gallaway's motion is granted in part and denied in part as more fully set forth below and plaintiff Lee-Singleton's cross motion is granted in its entirety.

Both actions arise from Lee-Singleton's and Gallaway's co-tenancy of real property and a building located at 570 West 161St Street, New York, New York ("Property"). In the action Lee-Singleton Action, Jeanne Lee-Singleton sues for a judicial partition of the Property, for rents and profits, for the proceeds of an Equity Line of Credit Matthew Gallaway allegedly drew upon, and for specific performance of a sale of the property. In Gallaway Action, Gallaway seeks a declaratory judgment removing Lee-Singleton's name from the deed for the real property, a declaratory judgment stating that Gallaway may transfer the property without Lee-Singleton's consent and without paying Lee-Singleton any consideration, and damages for breach of contract, unjust enrichment, interference with contractual relations, and defamation.

The relevant facts are contained in the moving papers and are not in serious dispute unless otherwise noted. On October 15, 1999, Gallaway and Lee-Singleton purchased the Property from the NY/Enterprise Cityhome Housing Fund Development Corporation. Pursuant to a New York City program designed to promote owner-occupancy of residential housing in disadvantage neighborhoods, Gallaway and Lee-Singleton acquired the property at a discounted price and received a loan in the amount of $84,000 from the New York City Department of Housing Preservation and Developments (HPD) which would be forgiven incrementally over the course of twenty five years, with a portion of the principal being forgiven each year. The deed, executed by Gallaway and Lee-Singleton, contained the following clause:

> For the longer of (x) twenty-five (25) years from the date of delivery of this deed or (y) the date that that certain Enforcement Mortgage executed and delivered by the party of the second part in favor of the City of New York simultaneously herewith, which secures the repayment of certain subsidies provided by the City of New York, is paid in full, the party of the second part and his/her/their successors and assigns shall occupy at least one dwelling unit of the Premises as such party's primary residence.
> It is further understood and agreed by the party of the second part that the City of New York shall be deemed beneficiary of the foregoing covenants, both for and in its own right and also for the purpose of protecting the interests of the community

> and other parties in whose favor or for whose benefits such covenants have been provided. The City of New York shall the right, in the event of any breach of such covenant, to exercise all the rights and remedies, and to maintain any actions or suits at law or in equity or in other proper proceedings, to enforce the curing of such breach of covenant to which it or any other beneficiary of such covenant may be entitled.

The deed refers to Gallaway and Lee-Singleton collectively as "party of the second part" and provides that "the word 'party' shall be construed as if it read 'parties' whenever the sense of this indenture so requires."

Lee-Singleton and Gallaway also executed a note and mortgage for the loan from HPD. The note contained the following language:

> 2. Except as otherwise provided in this Note or the Enforcement Mortgage the Secured Indebtedness shall be reduced by one-twenty fifth (1/25) of the original amount of the Secured Indebtedness for each full year during which the Obligor or Obligor's successors and assigns, owns and occupies as primary residence at least one unit on the Property.

The note refers to Lee-Singleton and Gallaway collectively as "obligor" and provides that:

> 15. If there are more than one Obligor each shall be separately liable. The words "Obligor" and "Obligee" shall include their heirs, executors, administrators, successors and assigns. If there are more than one Obligor or Obligee the words "Obligor" and "Obligee" used in this Secured Enforcement Note shall be read as if written in the plural.

They financed the remainder of the purchase price through a mortgage with Fleet National Bank ("Fleet"), which has since merged with Bank of America.

Lee-Singleton and Gallaway began occupying the Property as residents on October 15, 1999. The building on the Property is four stories. Lee-Singleton and Gallaway each occupied one floor themselves and rented the remaining floors out. Plaintiffs agreed to share all expenses and responsibilities for maintenance of the building. In October of 2002, they opened a joint checking account with Fleet, into which rental income was deposited and out of which expenses were paid. On June 5, 2003, they jointly obtained an equity line of credit from Fleet in the amount of $147,800.00, which was secured by the property.

In April of 2004, Lee-Singleton married and moved out of the building. Lee-Singleton

alleges that, prior to her departure, she and Gallaway agreed that Gallaway would remain in residence after she moved, that floor occupied by Lee-Singleton would be rented out, and that profits and losses would be shared as they had been before. Lee-Singleton also contends that she and Gallaway further agreed in writing on February 14, 2004 not to draw down the equity line of credit from Fleet. Lee-Singleton further alleges that, on March 11, 2004, Gallaway drew down $147,000 from the equity line of credit and transferred the money into his personal account, without Lee-Singleton's knowledge or consent. She alleges that Gallaway has paid down portions of the equity line but has also drawn down again, so that the entire amount of the line of credit is currently outstanding. Lee-Singleton further alleges that Gallaway has been depositing rent payments directly into his personal account since February of 2004.

Gallaway alleges that, since Lee-Singleton moved out, he has been solely responsible for the management of the building, including finding tenants and executing leases, collecting and depositing rent, cleaning, making repairs, paying all bills, including the mortgage and equity line of credit. He acknowledges that he drew upon the line of credit, but maintains that he used the money for capital improvements on the property. He alleges that he informed Lee-Singleton of these improvements and gave her a complete accounting thereof, as well as giving her monthly accountings of the income and expenses on the property, starting in September of 2004. Gallaway admits that he deposited rent payments into his personal account, but alleges that both he and Lee-Singleton did this frequently, and that money would only be placed into the joint checking account to make mortgage payments.

In October 2004, Lee-Singleton hand delivered a letter to all the tenants in the building, instructing them to submit their rent payments to Lee-Singleton's attorney, rather than Gallaway. The letter, written by Lee-Singleton's attorney, states that Gallaway is not authorized to accept rent payments, and if tenants continue to submit payments to Gallaway, Lee-Singleton would commence non-payment proceedings against them. Lee-Singleton's attorney also sent Gallaway a letter accusing him of stealing from the line of credit and mismanaging the property. The letter also stated that Fleet had been instructed to close the line of credit immediately and not to honor any checks drawn on the joint checking account that did not contain two signatures. Finally, the letter made an offer of $5,000.00 for Gallaway's interest in the property and stated that, if Gallaway did not accept

the offer, Lee-Singleton would commence a partition action to force the sale of the property. Gallaway has submitted copies of these letters in his moving papers.

Lee-Singleton alleges that, on October 5, 2004, Gallaway made a firm offer to sell Lee-Singleton his interest in the premises for $50,000, on the condition that Lee-Singleton assume the outstanding mortgage obligation, then approximately $230,000, and the outstanding balance due on the equity line of credit, then approximately $115,000. Lee-Singleton acknowledges that, on October 7, 2004, she sent Gallaway a letter accepting the offer, but that she would only pay $5,000 for the Property, as Gallaway had drawn an additional $45,000 from the line of credit after he conveyed his offer on October 5.

Gallaway acknowledges that he did offer to sell his interest to Lee-Singleton on October 5 for $50,000, plus an additional $15,000 to cover the cost appliances and fixtures he had installed. He alleges that this was the last in a series of offers for the sale of the property. He contends that Lee-Singleton's purported acceptance was nothing more than a counter-offer, which he did not accept.

On February 23, 2005, Lee-Singleton commenced an action against Matthew Gallaway, Bank of America as successor in interest to Fleet, HPD, and the City of New York. The action alleges six causes of action. In the first cause of action, Lee-Singleton seeks a partition and division of the property or, alternatively, a sale of the property if it cannot be divided, and a distribution of the proceeds among the parties according to their respective rights. In addition to Gallaway, Bank of America, HPD and City of New York are all named as parties to this cause of action, because they all have interests in the Property; Bank of America and the City of New York as lien holders, and the City of New York and HPD as parties to a restrictive covenant on the use of the land. The remaining causes of action are asserted against Gallaway only. The second cause of action alleges that Gallaway has drawn down upon the equity line of credit for his own use without Lee-Singleton's permission and that, as Lee-Singleton is jointly and severally liable to Bank of America for that money, she is entitled to indemnification from Gallaway in the amount that he has drawn down. In the third cause of action, Lee-Singleton seeks an accounting for the income and expenses for the Property from January 1, 2004, to the date of trial. The fourth cause of action alleges that, for the sole purpose of causing harm to Lee-Singleton, Gallaway intentionally and willfully converted the entire equity line of credit for his own use, that he intentionally and willfully failed to deposit all

income from the Property into the joint checking account, that he intentionally and willfully failed to account for income and expenses to Lee-Singleton, that he intentionally and willfully failed to pay the fair rental value of his unit in the Property, and that, based upon these failures, Lee-Singleton is entitled to actual damages in the amount of $500,000 and punitive damages in the amount of $2,000,000. The fifth cause of action contends that Gallaway converted money from the equity line of credit, that he failed to account for profits from the property, that he has failed to pay rent for the portion of the property used by him, and that, as a result, he has been unjustly enriched at Lee-Singleton's expense. Lee-Singleton seeks $500,000 in actual damages on this cause of action. In her sixth cause of action, Lee-Singleton alleges that she accepted Gallaway's offer to sell on October 7, 2005, and thus the parties had entered into a contract for the sale of the Property. Lee-Singleton seeks specific performance of that contract.

Gallaway filed an answer to Lee-Singleton's cause of action on June 27, 2005. It is not clear from the papers before the court whether the City of New York and Bank of America have appeared in the Lee-Singleton action.

On April 6, 2005, Gallaway commenced his own action, alleging seven different causes of action against Lee-Singleton. For his first cause of action, Gallaway seeks a declaratory judgment stating that Lee-Singleton is in breach of the Deed, the Note and Mortgage executed between Gallawy and Lee-Singleton and the City of New York, and that her name be removed from the lease and her interests and claims in the property be terminated. As a second cause of action, Gallaway seeks, as an alternative to the declaratory relief in the first cause of action, a declaratory judgment stating that he may transfer the property without Lee-Singleton's consent and without paying Lee-Singleton any consideration, and that he may manage the property without any interference from Lee-Singleton. As a third cause of action, Gallaway alleges that Lee-Singleton breached her agreement with him by moving out of the Property and by not sharing equally in maintenance responsibilities and expenses and improvements after moving out. Gallaway seeks damages for the breach in the amount of $50,000. For his fourth cause of action, Gallaway alleges that Lee-Singleton was unjustly enriched by moving out of the Property and leaving Gallaway to maintain the property, and that, as a result, Gallaway is entitled to the declaratory relief sought in the first or, alternatively, second cause of action. Gallaway's fifth cause of action alleges that Lee-Singleton has interfered

with Gallaway's contractual relations with his tenants, and that Gallaway is entitled to $50,000 in compensatory damages, and an additional $50,000 in punitive damages. Gallaway's sixth cause of action alleges that the letters Lee-Singleton sent to Gallaway and to the tenants were defamatory in nature, and have caused Gallaway injury. Gallaway seeks actual damages in the amount of $50,000 and punitive damages in the amount of $50,000. Gallaway's seventh cause of action alleges that Lee-Singleton negligently caused damage to Gallaway's credit rating by overdrawing the joint checking account. For this cause of action, Gallaway seeks actual damages in the amount of $50,000 and punitive damages in the amount of $50,000.

The instant motions followed.

The court will consider each of the substantive motions in turn.

Lee-Singleton's motion to dismiss the complaint in the Gallaway action

Lee-Singleton has moved, pursuant CPLR 3211(a)(7), to dismiss all of the causes of action set forth in Gallaway's complaint, on the ground that they do not set forth a cause of action. The court will consider each of Gallaway's causes of action in turn.

As to Gallaway's first cause of action for a declaratory judgment terminating Lee-Singleton's interests in the property, Lee-Singleton contends that she is not in violation of the primary residence requirement in the Deed and the City's mortgage, as they require that the purchaser shall occupy at least one dwelling unit of the premises as the party's primary residence and that, since Gallaway continues to occupy the Property as his primary residence, that requirement is satisfied. Moreover, she contends that the deed and the note are agreements between the parties and the City of New York, and that the City of New York is the beneficiary of the residency requirement. Consequently, she argues that, even if she was in breach of the deed or note, Gallaway could not use her breach as grounds to terminate her interests, as the City is the only party with the right to enforce the residency requirement against Lee-Singleton. She contends that Gallaway has no basis in law for seeking the relief he seeks. Lee-Singleton makes the same argument against Gallaway's second cause of action. For the sixth cause of action, Lee-Singleton contends that letter she sent to the tenants contained no defamatory, untrue statements, and that the letter she sent to Gallaway was addressed to Gallaway

and not to anyone else. Finally, Lee-Singleton contends the seventh cause of action for negligence must fail, as Gallaway's allegation was simply that she exercised control over the joint checking account and, because she was entitled to use the account, her actions cannot be deemed to be neligent.

The court will first consider Gallaway's first and second causes of action for declaratory judgment. On a motion under CPLR § 3211 (a) (7), the court's role is to determine whether plaintiffs' pleadings set forth cause of action. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). If any cause of action can be discerned from the pleading's four corners, the motion must be dismissed. (*Id.*) The complaint is liberally construed and any factual allegations contained therein are accepted as true. (*Id.*) When a stranger to a covenant or a deed seeks to enforce a covenant or a restriction contained in the deed, it must be clearly established that the covenant or restriction was intended to benefit the party seeking its enforcement. (*Bristol v. Woodward*, 251 NY 275, 284 [1929].) If a grantor of property intended the restriction to benefit himself, the buyers of his property, though subject to the restriction themselves, do not obtain the right to enforce the restrictions among themselves. (*Id.*)

Gallaway has failed to set forth a cause of action for the declaratory judgment he seeks in his first and second causes of action. Gallaway is seeking to enforce a covenant contained in the deed that Lee-Singleton has purportedly breached. While Gallaway is not a stranger to the deed or the mortgage and note, the deed clearly indicates that the covenant to occupy at least one dwelling unit in the property is for the benefit of the City of New York. Thus, assuming *arguendo* that Lee-Singleton has breached the covenant, Gallaway has no standing to enforce the covenant against her. Gallaway's claim that he and Lee-Singleton intended the covenant to be binding on each other finds no support in the language of the deed or the attendant circumstances. Indeed, Gallaway does not even offer any factual allegations to support his claim. Accordingly, Gallaway cannot now sue Lee-Singleton to enforce a portion of the deed that runs to the benefit of the City of New York.

The cases cited by Gallaway are not controlling in this action. In both *Malley v. Hanna* (101 AD2d 1019 [4th Dept 1984]) and *Graham v. Beermuner* (93 AD2d 254 [1st Dept 1983]) the plaintiffs and defendants bought parcels of subdivided tracts of land from the same sellers. Each deed for a parcel of the subdivided tracts contained the same covenants which were intended to promote a

common scheme of development for the entire subdivided tracts. The courts found that the plaintiffs could sue to enforce restrictive covenants contained in defendants' deeds, on the grounds that the restrictive covenants were intended for the mutual benefit of the plaintiffs and defendants. The restriction in question here is in furtherance of a policy instituted by the City of New York. It is not for the mutual benefit of the Gallaway and Lee-Singleton. Accordingly, Gallaway does not have standing to enforce it.

Moreover, assuming Gallaway could enforce covenants contained in the deed and mortgage, it does not appear that they would entitle him to terminate Lee-Singleton's ownership interest in its entirety. Rather, the covenants appear on their face to entitle their beneficiary, the City of New York, to accelerate the balance of the $84,000 loan when the primary residence requirement is breached. There is nothing in the deed, note, or mortgage that indicates the right of any party to extinguish either Lee-Singleton's or Gallaway's right to occupy the property. Accordingly, even if he were able to enforce the covenants in the deed in the mortgage, he would not be entitled to the relief he now seeks.

Turning next to Gallaway's third cause of action, Lee-Singleton contends that she did attempt to manage the property and pay carrying costs, and that it was Gallaway who kept her from fulfilling her duties under the agreement. To set forth a valid cause of action for breach of contract, the complaint must plead the terms of the agreement, consideration, performance by the plaintiff, and the basis of defendant's alleged breach. (*Furia v. Furia,* 116 AD2d 694, 695 [2nd Dept 1986].) Here, Gallaway has alleged the existence of an agreement between himself and Lee-Singleton that they would share all responsibilities and obligations arising out of the maintenance of the property, that Gallaway has met his portion of the obligation, and that Lee-Singleton has failed to meet hers. Lee-Singleton's contention that she has fulfilled her obligations under the agreement by seeking to collect rents from the tenants merely raises an issue of fact for trial. Accordingly, the third cause of action stands.

Turning to Gallaway's fourth cause of action for unjust enrichment, a cause of action for unjust enrichment is stated when the complaint alleges that the defendant received property belonging to the plaintiff or services rendered by the plaintiff, that the defendant benefitted from the receipt of the property or services and that, under the principles of equity, the defendant should not

be permitted to retain the property received or should be required to pay plaintiff for the services rendered. (*Matter of Estate of Witbeck*, 245 AD2d 848, 850 [3rd Dept 1997]; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998].) In an action for unjust enrichment, the measure of damages is typically the value of the property received by the defendant or the value of the services rendered by the plaintiff. (Restatement First of Restitution, §§ 151, 152.) Gallaway cites the beneficial financing Lee-Singleton receives as a result of Gallaway's maintaining the property as his primary residence, and the maintenance and management services Gallaway provides for the Property as the enrichment Lee-Singleton has unjustly received. Since these are both essentially services Gallaway has provided for Lee-Singleton, Gallaway would be entitled to recover payment from Lee-Singleton for those services under a theory of unjust enrichment. However, instead of seeking recovery for services, he seeks a declaratory judgment divesting Lee-Singleton completely of her title and, consequently, vesting title in him alone. This may be an appropriate remedy if Gallaway had previously held the property exclusively, and Lee-Singleton had converted it. However, Gallaway concedes that he and Lee-Singleton bought the property jointly. Accordingly, based upon the allegations he has set forth to support his claim for unjust enrichment, he may not seek to extinguish any right Lee-Singleton has in the property. He can replead this cause of action to recover money damages.

Gallaway's fifth cause of action for tortious interference with contract must likewise be dismissed. A cause of action for tortious interference with a contract requires a showing of (a) the existence of a valid contract between plaintiff and a third party, (b) defendant's intentional procurement of the third party's breach of that contract without justification, (c) an actual breach of that contract, and (d) damages as a result of that breach. (*Lama Holding Co. v. Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]). While Gallaway contends that Lee-Singleton sent letters to tenants instructing them not to pay rent Gallaway, Gallaway has not alleged that any of the tenants breached their lease agreements as a result of Lee-Singleton's action. Gallaway has alleged that one tenant moved out, but there is nothing in the complaint that indicates that the tenant moved out in breach of the lease. Accordingly, this claim is dismissed.

Gallaway's sixth cause of action for defamation is likewise dismissed. To constitute grounds for a libel action, a statement must be both defamatory and false. (*Christopher Lisa Matthew*

Policano, Inc. v. North America Precis Syndicate, Inc., 129 AD2d 488, 489 [1st Dept 1987].) A statement is defamatory if it exposes the plaintiff to "public hatred, shame, obloquy, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or [induces] an evil opinion of one in the minds of right thinking persons, and [deprives] one of their confidence and friendly intercourse in society. (*Kimmerle v. New York Evening Journal, Inc.* 262 NY 99, 102 [1933].) It is for the court to determine, initially, whether the words ascribed to the defendant are reasonably susceptible to defamatory connotation. (*Lenz Hardware Inc. v. Wilson*, 94 NY2d 913, 914 [2000].) Defamation also requires publication of the defamatory matter, which occurs when a third party hears or sees the defamatory matter. (*Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d 294, 298 [1st Dept 1999].)

Gallaway submits the two letters Lee-Singleton sent, the October 7 letter to him and the October 26 letter to the tenants, to support his claim. Neither of these letters supports a claim for defamation. The October 7 letter was sent to Gallaway and Gallaway does not allege that any other party saw it. Accordingly, the statements contained in that letter were not published. As for the October 26 letter, the language contained therein is not defamatory as a matter of law. The letter simply instructs tenants to submit their rent payments to Lee-Singleton's attorney. In fact, most of the sentences and clauses in the letter are not declaratory statements at all, but rather instructions and commands. The only statement contained in that letter was that Lee-Singleton had not authorized Gallaway to collect rent. Gallaway has not alleged that this statement is false and, even if it were, it is impossible to discern what, if any, injury such a statement would cause to Gallaway's reputation. Accordingly, the defamation cause of action fails to state a cause of action and must be dismissed.

Turning finally to Gallaway's seventh cause of action, holders of joint bank accounts are presumed joint tenants to the account. (*Plotnikoff v. Finkelstein*, 105 AD2d 10, 12 [1st Dept 1984].) Cotenants in property are in a quasi trust relationship and must defend the interests of all in the property. (*Markowitz v. Markowitz* 36 NYS2d 361, 362 [Supreme Court NY County, 1942], aff'd 265 AD 993 [1st Dept 1943].) As a joint tenant to the account with Gallaway, Lee-Singleton had a duty to act in Gallaway's interest with regards to the account. This duty can reasonably be extended to injury that may be caused to Gallaway by Lee-Singleton's use of account. Accordingly, Gallaway has set forth sufficient ground to support his claim for negligence resulting from Lee-Singleton's overdraft on the account.

Gallaway's motion for partial summary judgment on his complaint.

In the Gallaway Action, Matthew Gallaway has crossed moved for summary judgment on his first and second causes of action, and for summary judgment on his third cause of action for liability only for Lee-Singleton's breach of her agreement to share in maintaining th property.

Since the court has dismissed Gallaway's first and second causes of action, his motion for summary judgment on those causes of action is denied as moot. The court will consider his motion for summary judgment as to liability on his third cause of action.

The proponent of a motion for summary judgment under CPLR § 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Id.*) A co-tenant who expends resources to maintain common property is entitled to contribution from other co-tenants for their fair share of the costs. (24 NY Jur. Cotenancy and Partition § 72; *see also Vlacancich v. Kenny*, 271 NY 164, 170 [1936].)

Gallaway has alleged that he and Lee-Singleton agreed to share equally in all on-site maintenance duties, and that, since Lee-Singleton has moved out, Gallaway has been forced to carry on these responsibilities himself. Since Gallaway is entitled, as a matter of law, to seek contribution from his co-tenants for the fair share of costs in maintaining the property, Gallaway has made a *prima facie* showing that he is entitled to recovery the value of Lee-Singleton's fair share of his efforts. Lee-Singleton claims that she attempted to collect the rents from the tenants in October of 2004. However, this is insufficient to raise a material issue of fact as to her liability for maintenance work performed after she moved out. Accordingly, Gallaway's motion for summary judgment as to liability for his third cause of action is granted.

Gallaway's motion to consolidate the two actions

Gallaway also moves in both the Lee-Singleton Action and the Gallaway Action to consolidate the two actions. CPLR § 602 (a) states that, when two actions involving common questions of fact or law are pending before the court, the court may order the actions consolidated to avoid unnecessary costs and delays. Here, there is no question that the Lee-Singleton action and the Gallaway action have common issues of both fact and law and it would be more efficient to consolidate them. The only grounds Lee-Singleton has set forth for opposing the motion is that Gallaway's complaint fails to set forth a cause of action. However, as this court has already found that Gallaway has set forth two valid causes of action, this argument is without merit. Accordingly, this portion of Gallaway's motion is granted.

Gallaway's motion for summary judgment dismissing Lee-Singleton's complaint

In the Lee-Singleton action Gallaway moves for summary judgment dismissing Lee-Singleton's complaint in its entirety. The court will consider each cause of action in turn.

Turning to Lee-Singleton's first cause of action seeking partition of the Property, Gallaway contends that equity bars Lee-Singleton's claim for partition as she has moved out in violation of the deed and has breached her agreement with Gallaway to maintain the property, and that he intends to continue to reside at the property. A party who has an interest in property as a tenant in common may maintain an action to partition the property and for the sale of the property if the property cannot be divided without great prejudice to the owners. (Real Property Actions and Proceedings Law § 901[1].) An order of partition is subject to a balancing of the equities between the parties *(Ripp v. Ripp*, 38 AD2d 65, 68 [2nd Dept 1971] aff'd 32 NY2d 755 [1973].) However, where an adequate remedy exists at law, the reason for granting equitable relief disappears. *(Lichtyger v. Franchard Corp.* 18 NY2d 528, 537 [1966].)

Gallaway has not demonstrated that, in balancing the equities, partition should be denied. Indeed, for each injury he attributes to Lee-Singleton, it appears he has an adequate remedy at law to protect his interests. With regards to his contention that Lee-Singleton has failed to meet her

obligations with regard to maintaining the property, it was noted above that Gallaway is entitled to recover costs for Lee-Singleton's fair share of the maintenance duties. Gallaway has failed to demonstrate that, by moving out of the building, Lee-Singleton has indeed breached her obligations under the deed, mortgage, and note. Even assuming *arguendo* she had, there is no showing in the record that Gallaway would suffer any injury other than the City's acceleration of the note. Gallaway could remedy this injury by maintaining an action for damages against Lee-Singleton. Finally, if Gallaway seeks to remain living in the property, he may seek to buy out Lee-Singleton's interest in the property prior to partition, or he may seek to purchase the property at the partition sale. Since Gallaway has failed to demonstrate that he has inadequate remedies at law to protect his rights, is not in a position to exercise its equity jurisdiction to block the partition.

Turning to Lee-Singleton's second cause of action for breach of contract, Gallaway submits the Line of Credit Agreement, executed by Lee-Singleton, Gallaway and a representative for Fleet Bank on June 5, 2003. Galllaway contends that, as the equity line of credit was in both their names, Lee-Singleton consented to his use of the funds. He further contends that, as Lee-Singleton had equal access to the line of credit and knew that Gallaway was using the line of credit funds for the construction project, her failure to protest the use of the funds prior to October of 2004 precludes her from now seeking their recovery. The elements of a cause of action for breach of contract are an agreement, consideration, performance by the plaintiff, and a breach by defendant. (*Furia, supra,* 116 AD2d at 695.)

Gallaway has failed to make a *prima facie* showing that Lee-Singleton's second cause of action should be dismissed. Lee-Singleton's complaint alleges that she and Gallaway entered into a written agreement on February 14, 2004, that neither would draw down the equity line of credit. She alleges that Gallaway breached that agreement by drawing down on the line of credit. Gallaway does not challenge the existence of such an agreement. Any consent Lee-Singleton gave when she signed the letter of credit in June of 2003 was superseded by that agreement. Moreover, Gallaway has failed to establish that Lee-Singleton had knowledge that the construction was being funded by the equity line of credit prior to October of 2004. Gallaway has submitted a "final accounting" of the renovations and improvements for the Property, that details the cost of the work performed. However, it bears the date of December 13, 2004, and an accompanying fax cover sheet indicates

that it was faxed to Lee-Singleton's attorney on December 14, 2004. Gallaway has submitted no other proof that Lee-Singleton was aware of the production before she complained in October of 2004. Accordingly, he cannot now argue that Lee-Singleton's silence prior to that time was consent.

As for Lee-Singleton's third cause of action for an accounting for all income and expenses on the property from January 1, 2004 to the date of trial, Gallaway contends that he has already rendered an accounting, and as such he is no longer obligated to do so. RPAPL § 1201 provides that a tenant in common may institute an action to recover his just proportion against his co-tenant who has received more than his own just proportion. A co-tenant must account to his co-tenants for rent he receives above and beyond his just proportion. (*Goldberg v. Ochman*, 143 AD2d 255, 257 [2nd Dept 1988].) In the instant case, Gallaway has submitted statements that account for monthly income and expenses from the date of October of 2004 to July of 2005. Those accounts show that any net monthly income above net expenses was applied to capital improvements in the property. Lee-Singleton does not object to the validity of those statements. However, the third cause of action seeks an accounting starting from January 1, 2004. Accordingly, Gallaway has not established that he has made an accounting to Lee-Singleton for the period from January 1, 2004 to September 30, 2004 and from August 1, 2005 to the present. That portion of his motion is thus denied.

While Lee-Singleton has not set forth the legal basis for the relief she seeks in her fourth cause of action, it appears to plead causes of action for breach of contract. In her complaint, Lee-Singleton alleges: 1) that she and Gallaway agreed to share all profits and losses of the premises; 2) that each would have and equal say in capital improvements and expenditures, and that neither could make such improvements or expenditures without the consent of the other; 3) that monthly accountings would be made for all income and expenses; 4) that each party would pay the fair rental value of the property they occupied; 5) that all income derived from the property would be paid into, and all expenses for the property paid out of, a joint checking account in both Lee-Singleton's and Gallaway's names; and 6) that, on February 14, 2004, both parties agreed in writing not to draw upon the equity line of credit. Lee-Singleton further alleges that Gallaway drew down upon the entire equity line of credit, that he failed to deposit income derived from the property into the joint checking account, that he failed to account for the income and expenses for the premises, that he has failed to contribute to pay the fair rental value of the premises he occupied, and that Gallaway did

so willfully and for the purpose of causing her harm.

In support of his claim for summary judgment dismissing Lee-Singleton's fourth cause of action, Gallaway alleges that the joint checking account was opened in October of 2002, at the same time he and Lee-Singleton refinanced the mortgage on the property. He alleges that they opened the account solely so that mortgage payments could be withdrawn automatically. He further alleges that, before and after opening the account, he and Lee-Singleton deposited the rental income from the Property into their own accounts, and that he would ensure that, each month, sufficient funds were deposited in the joint checking account to cover the mortgage payment. To support this claim, he has submitted statements from Fleet that show that the joint checking account was opened on October 8, 2002. Gallaway further contends that, while he did draw down the equity line of credit, he used the proceeds therefrom exclusively for capital improvements on the property. Finally, with regards to his failure to pay the rental value for the portion of the Property used by him, Gallaway alleges that all rental income was used to fund capital improvements on the property.

Gallaway has failed to make a *prima facie* showing that Lee-Singleton's fourth cause of action should be dismissed. In her complaint, Lee-Singleton has alleged that the parties agreed to make rental payments for the spaces they used, and both parties must consent to expenditures for any capital improvements to the property. Gallaway does not deny that such an agreement was in place. While he may have used rental income and the proceeds of the equity line of credit to improve the property, this does not refute the fact that was in direct violation of his agreement with Gallaway not to do so without her consent. While Gallaway has submitted the bank statements for the joint checking account, he has not submitted any proof that he and Lee-Singleton continued to use their personal accounts after the joint account was established. Accordingly, he has failed to demonstrate that he was not in breach of agreements he made with Lee-Singleton concerning income and expenditures relating to the property.

Turning next to Lee-Singleton's fifth cause of action for unjust enrichment, Gallaway has made a *prima facie* showing of entitlement to judgment as a matter of law. In an action for restitution based upon unjust enrichment, a party seeking recovery must have suffered a loss. (*State v. Barclay's Bank of New York, N.A.* 76 NY2d 533, 540 [1990].) To support her cause of action for unjust enrichment, Lee-Singleton alleges that Gallaway converted money from the equity line of

credit, failed to account for income from the property, and has failed to pay the fair rental value of the portion of the property he occupies. Gallaway alleges that money he drew from the equity line of credit, as well as the rental income he received from the property, went towards maintenance and capital improvements on the property. To support this claim he has submitted bills and receipts for work done on the premises. He has also submitted statements of accounting from October of 2004 to July of 2005. The statements show rental income for the premises, and payments to the mortgage, equity line of credit, and for cleaning and utilities. Accordingly, Gallaway has made a *prima facie* showing that the rental income and the money he drew from the equity line of credit went towards the maintenance and improvement of the Property. Since Lee-Singleton still owns the property as a tenant in common with Gallaway, Gallaway has established that Lee-Singleton has not suffered any loss from his actions. Thus Gallaway has made a *prima facie* showing that Lee-Singleton's fifth cause of action should be dismissed. Thus, the burden now shifts to Lee-Singleton to demonstrate that a material issue of fact exists in this cause of action. Lee-Singleton has not made any showing that Gallaway did not spend the rental income or the proceeds of the line of credit to maintain and improve the property. Nor has she shown that she suffered any other loss as a result of Gallaway's use of the money in question. Accordingly, this cause of action is dismissed.

Turning finally to Lee-Singleton's sixth cause of action for specific enforcement of an alleged contract between the parties for the sale of the Property, Gallaway contends that Lee-Singleton's alleged "acceptance" was simply a counter-offer, which he did not accept. When a party purports to accept an offer to form a contract, but what is accepted to differs from what was originally offered, the purported acceptance is deemed to be a rejection of the offer. (*Watts v. Thomas Carter & Sons, Inc.*, 207 AD 656, 659 [2nd Dept 1924].) In the instant case, Lee-Singleton claimed to accept Gallaway's offer with a $45,000 reduction in the price. Since there was a substantial difference between Gallaway's original offer ($50,000 plus assumption of the outstanding obligations) and the terms Lee-Singleton agreed to ($5,000 plus assumption of the outstanding obligations), Lee-Singleton's purported acceptance was in fact a rejection of Gallaway's offer. Accordingly, there is no contract to enforce, and the sixth cause of action is dismissed.

Lee-Singleton's motion for summary judgment on her causes of action for partition and accounting.

Lee-Singleton moves for summary judgment on her first and third causes of action, for partition and an accounting respectively. The court will consider each cause of action in turn.

As for the first cause of action for partition of the Property, absent an express agreement to the contrary, a testamentary restriction against partition, or extreme prejudice to a co-owner, a partition is a matter of right of a co-owner who no longer desires to hold or use the property in common. (*Chiang v. Chang*, 137 AD2d 371, 373 [1st Dept 1988].) Article 9 of the New York Real Property Actions and Proceedings Law governs partition actions. RPAPL § 901 (1) provides that a person holding and in possession of real property as a joint tenant or tenant in common may maintain an action for partition of that property. RPAPL § 903 provides that any person with a present undivided share, or a future undivided interest by reversion or contingency shall be joined as a necessary defendant to the action. RPAPL § 904 (2) provides that a party with a lien or interest on the property may joined as a party defendant. RPAPL § 905 states that, in an action for partition, the complaint shall describe the property with reasonable certainty and specify the rights of all the named parties. The failure to contribute to the maintenance of commonly held property is not sufficient grounds to bar a cause of action for partition. (*Bufogle v. Greek*, 152 AD2d 527, 528 [2nd Dept 1989].) The fact that one cotenant wishes to continue to occupy the property is similarly insufficient to bar partition. (*Ferguson v. McLoughlin*, 184 AD2d 294, 295-296 [3rd Dept 1992].)

Lee-Singleton has made a *prima facie* showing that she is entitled to a partition of the property. There is no dispute in the record that she and Gallaway currently hold the property as tenants in common. In addition to Gallaway, she has sued the City of New York and Bank of America as lienholders in the property. She has also sued the City of New York as an interest holder based upon the restrictive covenant concerning occupancy in the deed. The complaint accurately describes the property and the rights of all the parties in interest. Thus, the burden shifts to Gallaway to raise a material issue of fact concerning her entitlement to partition.

In his opposition to Lee-Singleton's motion, Gallaway simply reiterates the arguments he raised in his motion for summary judgment dismissing the first cause of action, that permitting a partition would be inequitable. As the court has held above, the grounds he sets forth to support his

claim, that it would be inequitable to permit a partition, are not sufficient to block the partition on equitable grounds. Gallaway has not shown the existence of an express agreement between himself and Lee-Singleton that would prohibit the sale. While he may wish to continue to reside on the property, his desire to do so does not create a sufficient legal basis to block the partition sale. Accordingly, Lee-Singleton's motion for summary judgment on her partition cause of action is granted.

As for the portion of Lee-Singleton's motion seeking summary judgment on the third cause of action for an accounting, a co-tentant must account for any rents he has received in excess of his just proportion. (RPAPL § 1201; *Goldberg v. Ochman*, 143 AD2d 255, 257 [2nd Dept 1988].) The court has held above that, with regards to the period from October 2004 to July of 2005, Gallaway has accounted for the rents and profits he has received from the property. However, the third cause of action seeks an accounting from January 1, 2004 until the date of trial for this action. Since there is no dispute that Lee-Singleton and Gallaway hold the property as tenants in common, Lee-Singleton's cause of action for an accounting is granted for the period from January 1, 2004 up to September 30, 2004, and from August 1, 2005, until the date of trial.

Gallaway contends that Lee-Singleton is not entitled to an accounting because she has not established that he refused to turn over required records for an accounting. The case Gallaway cites to support that contention, *Adam v. Cutner & Rathkopf*, (238 AD2d 234 [1st Dept 1997]) is not controlling here. In that case, the court held that, to show entitlement in equity to an accounting upon the dissolution of a partnership, the party seeking the accounting must demonstrate a failure on the part of the partners to account for the profits. Here, Lee-Singleton does not seek to invoke the court's equity jurisdiction to compel an accounting of a partnership. Rather, she seeks the accounting through RPAPL § 1201, which imposes no such showing. Accordingly, Gallaway has failed to demonstrate that Lee-Singleton is not entitled to summary judgment on this cause of action.

Accordingly, it is hereby

ORDERED that, in the action entitled Matthew Gallaway v. Jeanne Lee-Singleton (Index No. 105314/2005) Defendant Lee-Singleton's motion to dismiss the complaint is granted to the extent that the first, second, fourth, fifth, and sixth, causes of action are dismissed, and is denied as to the remaining causes of action, and it is further

ORDERED that, in the action entitled Matthew Gallaway v. Jeanne Lee-Singleton (Index No. 105314/2005) Plaintiff Matthew Gallaway's motion for summary judgment is granted to the extent summary judgment is granted in favor of Gallaway as to liability only on his third cause of action, and the motion is denied in all other respects; and it is further

ORDERED that in the action entitled Jeanne Lee a/k/a Jeanne Lee-Singleton v. Matthew L. Gallaway, Bank of America, as successor in interest to Fleet National Bank, the City of New York, acting by and through its Department of Housing Preservation and Development and the City of New York (Index No. 102561/2005), plaintiff Jeanne Lee-Singleton's motion for summary judgment on her first and third causes of action is granted, and that entry of judgment on those causes of action is stayed until the status conference mentioned in the final decretal paragraph; and it is further

ORDERED that, in the action entitled Jeanne Lee a/k/a Jeanne Lee-Singleton v. Matthew L. Gallaway, Bank of America, as successor in interest to Fleet National Bank, the City of New York, acting by and through its Department of Housing Preservation and Development and the City of New York (Index # 102561/2005), Defendant Matthew L. Gallaway's motion is granted to the extent that the fifth cause of action is dismissed and this action is consolidated with the action entitled Matthew Gallaway v. Jeanne Lee-Singleton (Index # 105314/2005), and is denied in all other respects, and it is further

ORDERD that the action entitled in the action entitled Jeanne Lee a/k/a Jeanne Lee-Singleton v. Matthew L. Gallaway, Bank of America, as successor in interest to Fleet National Bank, the City of New York, acting by and through its Department of Housing Preservation and Development and the City of New York (Index # 102561/2005) is consolidated in this court with the action entitled Matthew Gallaway v. Jeanne Lee-Singleton (Index # 105314/2005), under Index No. 102561/2005, and the consolidated action shall bear the following caption:

Jeanne Lee-Singleton

Plaintiff

-against-

Matthew L. Gallaway, Bank of America, as successor in interest to Fleet National Bank, the City of New York, acting by and through its Department of Housing

Preservation and Development and the City of New York;

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation, and it is further

ORDERED that the parties shall appear for a status conference before the court on Friday, March 17, at 12:00 noon, at 111 Centre Street, Room 581, New York New York.

This constitutes the decision and order of the court.

Dated: February 17, 2006
New York, New York

ENTER:

Karen S. Smith, J.S.C.