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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY PART 8
Justice

Index Number : 113312/2010
DIAZ, JUNOT
vs.
ALCANTARA, MARISOL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 113312/10
MOTION DATE 3/28/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 26, were read on this motion to/for summary judgment on partial action

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1 - 20
Answering Affidavits — Exhibits 1 mem 3 cnw No(s). 21 - 25
Replying Affidavits No(s). 26

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
JAN 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 22, 2013

J.S.C.
JOAN M. KENNEY

1. CHECK ONE: ..... CASE DISPOSED ..... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ..... SETTLE ORDER ..... SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

----------X

Junot Diaz,

Plaintiff,

-against-

Marisol Alcantara,

Defendant.

----------X

DECISION AND ORDER
Index Number.:113312/2010
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment on a claim for partition of property and an accounting.

Papers	**Numbered**
Notice of Motion, Affidavits, Exhibits	1 - 19
Affirmation in Opposition & Exhibits & Memo of Law	20 - 24
Reply Affirmation	25

In this action for partition, plaintiff seeks an Order, pursuant to CPLR 3212, granting plaintiff judgment on the claims filed against defendant, seeking entitlement to the division and sale of a residential building known as 529 West 141 Street, NYC 10013, Block 2073, Lot 16 (the property) owned between the parties to this action as tenants in common. Plaintiff avers that the proceeds of the sale of the property at public auction must be distributed in accordance with the parties' rights after a hearing, or an Order of Reference issued pursuant to CPLR 911, for an accounting to determine the parties' respective financial interests. Plaintiff further seeks an Order, pursuant to CPLR 3212, dismissing defendant's counterclaims and striking defendant's affirmative defenses.

FACTUAL BACKGROUND

Briefly, plaintiff and defendant dated from about 2001 through 2004. In 2002 defendant told plaintiff about the property and suggested that they purchase the property together. Plaintiff agreed to purchase the property essentially as an"investment opportunity."

The initial purchase of the property occurred on or about May 2002 after an alleged down

payment was made of $101,000.00. Plaintiff claims to have paid $80,000.00 and asserts that defendant contributed $21,000.00 towards to total down payment amount. Plaintiff asserts that in 2002, the parties agreed that the rental income would pay for the costs of the property and that defendant would also pay the fair market rent for the apartment occupied by defendant as well as administer the property's construction project and rental units. Plaintiff states that no further monetary contributions were ever requested by defendant.

Defendant avers, however, that plaintiff paid $60,000.00 towards the down payment. Defendant did not set forth how much defendant contributed towards the down payment amount. Defendant denies that defendant agreed to pay a fair share of the market value to occupy an apartment at the property, although defendant claims to have expended defendant's own monies to make required payments in maintaining the property - payments that could not be covered by rental monies alone.

Plaintiff asserts that the original purchase price of the property was approximately $465,000.00 whereas defendant claims that the purchase price for the property was $360,000.00.

Neither party produced the contract of sale of the property to verify the actual purchase price of the property and it is clear to this Court that the parties dispute the amounts initially invested by both parties.

Defendant admits that defendant's lack of a reliable credit history made it difficult for both defendant and plaintiff to obtain a mortgage together to purchase the property. A friend, Kathy Stapleton, agreed and did serve as a mortgagee (along with plaintiff) in order to purchase the property, and it was agreed amongst all three that Kathy Stapleton would convey interest to defendant and that both plaintiff and defendant would eventually be the legal owners of the property,

as was their original plan.

Neither party disputes that Kathy Stapleton's property interest as a co-signer of the initial mortagage(s) and the deed, was an accommodation solely for defendant's benefit.

Plaintiff admits that in the latter part of 2003 and/or early part of 2004 plaintiff resided at the property with defendant for about three months before moving out, leaving some of plaintiff's possessions in the basement of the property. The parties admittedly broke off their romantic relationship in 2004.

Yet, in 2007, plaintiff claims that the parties took out another mortgage loan on the property in order to "retire the original mortgages" held between Stapleton and plaintiff back in 2002. This additional loan in 2007 also secured a lower interest rate.

Plaintiff asserts that in 2008 plaintiff was offered a teaching position in New York City and plaintiff wanted to use an apartment in the property to reside in but that defendant "basically took the position that [defendant] would not let [plaintiff] live in the building ... and would either bar access to [plaintiff], or, alternatively [defendant] would move out of [the] apartment if [plaintiff moved in ..." (see plaintiff affidavit paragraph 35). Plaintiff then decided not to teach in New York and dropped the matter "rather than subject ... to a projected legal dispute with [defendant]. It is not clear if at the time plaintiff made this request, a tenant was occupying the second floor apartment.

Plaintiff avers to having sent defendant checks to cover expenses. It is not clear to this Court when these checks were issued, how much was issued and what expenses these checks were meant to cover of the property's maintenance costs.

It is further alleged in the summons and complaint that as tenants-in-common both parties are entitled to an undivided one-half interest in the property. The complaint states that there is a

mortgage on the property with an unpaid balance due and owing of approximately $780,000.00. Plaintiff further alleges in the complaint that defendant has collected all rents and profits from the property since February 26, 2007 but that defendant has never rendered an "account" to plaintiff even though plaintiff asserts that demands for an account have been made.

Now, after defendant allegedly refused to accept plaintiff's proposed settlement offer to have defendant "buy out" plaintiff's interest in the property, plaintiff commenced the within action for partition because plaintiff no longer desires to be a co-owner with defendant of the four story, 3 residential apartment, property.

In the responsive pleading, defendant generally denies the allegations in the complaint and asserts that plaintiff and defendant initially intended to own the property together in contemplation of marriage and starting a family. Plaintiff denies this claim contending that they had never discussed marriage and never discussed having children together.

Defendant states that both parties were aware that due to its uninhabitable condition, the property would need approximately $300,000.00 in renovation work before they could move in and that a mortgage loan was issued together with a construction loan. Defendant claims to have overseen the renovation process because plaintiff was engaged in working in another state altogether. Defendant even asserts that defendant was responsible for removing the homeless people living at the premises when it was purchased back in 2002, was responsible for hiring the contractors and oversaw every construction to renovate and improve the property.

The renovations ceased in the spring of 2003. Soon thereafter, defendant moved into the property.

Defendant avers that plaintiff never moved into the property and that they never married as

promised by plaintiff. Plaintiff asserts, however, that he did reside at the property for almost three months in late 2003 and early 2004. After realizing that the relationship with defendant was "deteriorating," plaintiff decided to move out.

Defendant adds that the parties orally agreed that defendant "would assume responsibility for making all mortgage payments from rental income together with whatever income they each could generate during the summer of 2003" (see answer ¶ 39). Defendant claims that although defendant was able to rent out three apartments at the property, the rental income alone could not cover the mortgage payments and defendant, without any financial assistance from plaintiff, paid the mortgage on the property.

In 2004, defendant asserts that plaintiff orally agreed that "if [d]efendant agreed to assume responsibility for making all payments on the mortgage, paying all taxes and related charges to the property, servicing its tenants and ensuring its upkeep that [defendant could 'keep the property'] because [plaintiff did] not want it anymore" (see ¶ 44 of the answer). Defendant claims to have agreed to these terms and made all payments pertinent to the property as well as maintaining it from 2004 through to the present upon reliance on plaintiff's oral promise that she would be the sole owner of the property.

Plaintiff denies that there was any such oral agreement between the parties. Plaintiff's understanding was that since plaintiff put a larger down payment amount for the purchase the property, rental monies could be used to pay for the building's expenses and nothing more was agreed. Plaintiff makes no mention of who was paying off the mortgages – just that it was essentially agreed that the tenant's rent monies would be used to pay the building's "expenses." Plaintiff re-iterates that defendant never provided plaintiff with an accounting. It is noted that plaintiff is silent

as to what monies, other then the down payment and some checks, plaintiff contributed to the financial upkeep of the property for approximately eleven years.

Defendant maintains that plaintiff abandoned the right to live at the property. Defendant further adds that a request was indeed made by plaintiff to move into the property in 2008, but defendant "did not want [plaintiff] to move into the" property and communicated this to plaintiff as defendant did not want to live with an ex-fiancé.

There is no dispute that defendant appears to have paid for the majority, if not all, of installments on the mortgages, paid all real estate taxes, water/sewer charges, utilities, maintenance, collected the rent monies and other financial payments on the property since its purchase in 2002. Defendant has made all financial payments (albeit with some of the rent monies from tenants at the property) from 2002 through to the present – a span of approximately 11 years. Plaintiff does not dispute that defendant not only managed the construction project to make the property habitable, but also served as the property manager all these years.

In 2005, defendant claims to have asked plaintiff to assist defendant in re-financing the mortgage in order to obtain a reduced interest rate. The property was in fact refinanced, the interest rate was a reduced rate and Kathy Stapleton was removed as a mortgagee on the original loan and defendant assumed the responsibility as mortgagee, along with plaintiff, on the new re-financed mortgage loan and back in 2005 Kathy Stapleton's interest in the property was also transferred to defendant, making plaintiff and defendant legal co-owners of the property.

Defendant generally denies the allegations in the complaint and contends that the within action must be dismissed because: (1) the complaint fails to state a cause of action; (2) plaintiff cannot maintain the within action for a partition of the property because plaintiff is barred by the

doctrine of waiver, estoppel, quasi-estoppel, laches and unclean hands; (3) plaintiff is barred from commencing this action by reason that payments have been made, set offs and/or accord and satisfaction; (4) the complaint is facially defective as it failed to comply with RPAPL § 901(1); and (5) plaintiff cannot recover from defendant any monies as defendant has expended "vast sums to renovate, repair and maintain the premises without any financial or other" assistance from plaintiff; and, (6) plaintiff is not entitled to the equitable relief of a partition as there exists an adequate remedy at law.

In addition to the aforementioned affirmative defenses, defendant interposed the following three counterclaims against plaintiff: (1) that a constructive trust be established on plaintiff's interest in the property and for the benefit of defendant to prevent unjust enrichment that would arise from a partition of the property; (2) that the Court enforce, through specific performance, oral agreement that defendant would be the sole owner of the property, or alternatively damages in the amount of $5 million dollars for plaintiff's breach of said oral contract; and (3) promissory estoppel.

It is alleged that at the time the within motion application was interposed, defendant still occupied the apartment at the property as a primary residence. Defendant claims that the property is not, and has not been, plaintiff's primary residence.

Neither party disputes that this Court recognize that plaintiff and defendant were tenants-in-common of the property when it was purchased back in 2002.

ARGUMENTS

Plaintiff argues that defendant's affirmative defenses are not sufficient to defeat the within application for judgment in plaintiff's favor and that defendant's counterclaims are without merit and must be dismissed.

Defendant contends that there a numerous factual issues to be resolved at trial and this action cannot be resolved in plaintiff's favor because plaintiff agreed that the property would be deeded solely to defendant if defendant took on all financial responsibilities for the property which defendant claims to have done. Additionally, defendant argues that discovery in this matter has not commenced and the within application pursuant, pursuant to CPLR 3212, is premature.

DISCUSSION

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" *(Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

The burden of production as well as the burden of persuasion always rests with the proponent of the motion (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Consequently, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact. Once that burden is satisfied, the opponent of the motion must produce sufficient evidence, in admissible form, establishing the existence of a triable issue of fact. Therefore, "if the [evidence] on the issue is evenly balanced, judgment must be rendered against the party bearing the burden of proof" *(300 East 34th Street Co. v Habeeb*, 248 AD2d at 50, [1st Dept 1997]). Nevertheless, it is the opposing party's burden to "assemble, lay bare and reveal ... proof in order to show that claims are real and capable of being established on trial" (*Sony Corporation of America v. American Express Company et al.*, 115 Misc.2d 1060 [Civ Ct, NY County, 1982]).

Article 9 of the Real Property and Procedures Law governs actions for partition which is a

statutory action controlled by the principles of equity. Pursuant to both the common law and statute, 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 (*Chew v Sheldon*, 214 NY 344, 348, 108 NE 552, 4 Bradb. 15, 14 Mills 543 [1915]; *Chiang v. Chang*, 137 AD2d 371, 373, 529 NYS2d 294 [1988]; *Ferguson v McLoughlin*, 184 AD2d 294, 294, 584 NYS2d 816 [1992]).

The right to seek partition, however, is not absolute and may be precluded where the equities so demand (*Graffeo v Paciello*, 46 AD3d 613, 614, 848 NYS2d 264 [2007], lv dismissed 10 NY3d 891, 891 NE2d 297, 861 NYS2d 263 [2008]; Ripp at 68), or where partition would result in prejudice (*Ferguson* at 294; *Ranninger v Pevsner*, 306 AD2d 20, 759 NYS2d 661 [2003]; *Piccirillo v Friedman*, 244 AD2d 469, 469-470, 664 NYS2d 104 [1997]). The threshold issue to be addressed is whether a partition is an appropriate remedy. "[P]artition is an equitable remedy in nature and this 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" (*Brady v Varrone*, 65 AD3d 600 [2nd Dept 2009]).

All of defendant's affirmative defenses to this action must be stricken.

First, the complaint has stated a cause of action and the matter cannot be dismissed pursuant to CPLR 3211(a)(7). When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations

made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff *(Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).

The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced. The test of prejudice is to be given primary emphasis. Thereby, the court disregards pleading irregularities, defects, or omissions that are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause or defense.

Here, plaintiff stated the elements necessary for a cause of action for partition of the property, to wit, demonstrating ownership, right to possession to the property and as assertion that physical partition alone could not be made without great prejudice.

The assertion that this action cannot be maintained because plaintiff is barred by the doctrine of waiver, estoppel, quasi-estoppel, laches and unclean hands, lacks merit. These affirmative defenses are based upon a purported oral agreement that essentially results in plaintiff turning over

of all plaintiff's property interest to defendant. The oral agreement, however, is unenforceable because, irrespective of its existence (i.e. whether it was orally made or not) such a contract would have violated the statute of frauds. New York General Obligations Law § 5-703, states in pertinent part:

> § 5-703. Conveyances and contracts concerning real property required to be in writing
> 1. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

There is no dispute that the oral promise to convey to defendant plaintiff's interest in the property, provided defendant took on all financial responsibilities for the property, was not in writing and therefore was, at best, an un-enforceable promise.

The statement that plaintiff cannot recover from defendant any monies as defendant has expended "vast sums to renovate, repair and maintain the premises without any financial or other" assistance from plaintiff, as an affirmative defense, is also, without merit. The argument that defendant is entitled to have the premises deeded to defendant because it would "simply be unfair to allow plaintiff to have partition at this time," is insufficient to warrant dismissal of this action on said grounds. Additionally, the proper showing of "prejudice" were a partition and sale of the property at a public auction granted, has not been met at this juncture of the litigation, although it has been somewhat alluded to when defendant continues to assert that the property has been her sole primary residence for nearly eleven years now and that defendant alone has maintained the property.

The affirmative defense that defendant's expenditures on the property, without plaintiff's contribution, bars plaintiff's entitlement to commence this action, is equally without merit. The

payments made, if any, would be the subject of the hearing to determine an accounting, which could then be deducted/added to the respective amount due to each party when and if an interlocutory judgment directing the sale of the subject property is directed. But such an affirmative defense cannot bar commencement of this action.

Defendant argues that because plaintiff was not a person who held or was ever "in possession" of the property, plaintiff cannot maintain the within action for partition in accordance with RPAPL § 901(1), which states, in pertinent part, as follows:

> § 901. By whom maintainable
>
> 1. 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.

However, actual possession is not necessary to enable a person to maintain an action for partition. The requirement here is to be able to establish that plaintiff has a "right to possession of the property" (see *Donlon v Diamico*, 33 A.D.3d 841 [2nd Dept 2006]) and plaintiff has demonstrated that right of possession by producing the deed to the property. As previously noted, a cause of action for partition was stated and the pleadings are not facially defection pursuant to RPAPL § 901(1).

Defendant's last stated affirmative defense asserting that plaintiff is not entitled to the equitable relief of partition of property because there exists an adequate remedy at law, is unsupported and not an adequate defense because an action for partition *is* an action at law governed by statute yet equitable in nature.

This Court also finds that all three of defendant's counterclaims must be dismissed.

Again, the assertion that defendant is entitled to damages based on equitable etoppel and

breach of contract regarding an oral agreement by plaintiff to turn over all property interest to defendant upon defendant's assumption of all responsibilities related to the property would violate the statute of frauds (General Obligations Law § 5-703) and cannot be enforced. It is further noted that because the purported agreement was not in writing, defendant has not set forth a prima facie entitlement to any judgment on a claim for breach of an oral agreement as described in the responsive pleading. Therefore the 2nd and 3rd counterclaims against plaintiff must be dismissed.

The 1st counterclaim seeks an imposition of a construction trust. A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not, in good conscience, retain the beneficial interest. It requires a showing of a confidential or fiduciary relationship, a promise, a transfer of property in reliance on that promise and unjust enrichment arising from the breach of that promise (*Sharper v. Harlem Teams for Self-Help, Inc.*, 257 A.D.2d 329 [1st Dept 1999]).

This Court is not at all convinced that defendant decided to become financially responsible for the upkeep of the premises based on some promise plaintiff allegedly made to marry and have a family with defendant. The facts are undisputed: the property was co-owned by plaintiff and one Kathy Stapleton (for defendant's benefit) in 2002; in 2004, the "romantic" relationship between plaintiff and defendant, was over; and in 2005 Kathy Stapleton transferred her interest in the property to defendant so that defendant, after knowing that plaintiff no longer wished to be allegedly married, decided to become the legal co-owner of the property with plaintiff by having defendant's name added to the deed when Kathy Stapleton transferred her interest to defendant on April 8, 2005, *after* the purported promise to marry and after the relationship between the parties to this action was undisputedly over. Nor can it be argued that the promise was the oral agreement to have plaintiff

transfer all property interests to defendant upon defendant's assumption of various responsibilities to maintain the property. Again, such an agreement is unenforceable. In sum, defendant is not entitled to a constructive trust having failed to set forth entitlement to same. It is not at all clear what the parties' incentive was to continue to be legally bound by the deed as co-owners of the property in 2005, a year after they broke off their romantic relationship in 2004.

Defendant argues that plaintiff would be unjustly enriched if plaintiff is allowed to obtained a one-half share interest of the property when plaintiff contributed nothing to the financial upkeep and responsibilities of the property since the inception of its purchase. In other words, defendant's concern is that a one half division of the property would unfairly give plaintiff a financial benefit of one half the proceeds of the sale of the property when plaintiff never even contributed to its financial maintenance for approximately 11 years. Defendant argues that losing defendant's home for the past 11 years is "unfair," particularly since defendant has financially maintained the property since 2003 or so without plaintiff's financial assistance. Defendant further claims that it would be "unfair" to lose her home through a sale of the property in a public auction. Although this Court is cognizant of defendant's concerns, these matters are more appropriately reserved for an accounting hearing then to support a counterclaim for a constructive trust to be established and/or for an order declaring defendant the sole owner and/or for dismissal of the instant action at this juncture of the litigation.

Affirmative reliefs may not be warranted in defendant's favor by way of the instant motion, however, this Court is inclined to make certain factual findings to clarify both parties' positions in this matter. First, this Court notes that plaintiff did not affirmatively state what action defendant took, other than defendant's clear desire that plaintiff not move into the building and/or the apartment defendant was occupying back in 2008, to oust plaintiff from access to the property.

Defendant did not take any actual action to prevent plaintiff from occupying the second floor apartment as it was intended by plaintiff. It is clear to this Court that defendant simply did not want plaintiff residing at the property but defendant did nothing like locking plaintiff out, calling the authorities etc. to prevent plaintiff from moving into the property.

It is in fact incomprehensible to this Court why plaintiff believes to have had the right to occupy the actual apartment being occupied by defendant at the time - especially considering plaintiff's approximate six year absence from the property and approximate four year break-up from defendant. It's actually untenable to assume that defendant's residence entitled plaintiff to a hotel stay at defendant's primary home. That said, this Court re-iterates that plaintiff failed to demonstrate an ouster by defendant in accessing other available residential units in the property, if any. The e-mails/texts/conversations regarding the 2008 request to stay at either defendant's apartment or the second floor apartment amounts to nothing more than a discussion between the parties and was not an ouster. It is further noted that some of plaintiff's possession may still have been stored at the property's basement - though it is not clear when, if ever, plaintiff went back after leaving in 2003 or 2004 to remove plaintiff's possessions from the premises. Nor has it been asserted that plaintiff was prevented from re-entering the property to obtain plaintiff's possessions.

This Court is disregarding the e-mails/texts/oral conversations etc. as to either parties' purported desires to resolve this conflict by deeding and/or leaving the property and/or abandoning their respective rights to the property. These "messages" were being relaid to each other in contemplation of "settlement" and can safely be deemed "settlement discussions" which at this point, having commenced litigation, is irrelevant to this Court's obligations to determine the parties' perspective rights versus their emotionally based desires communicated via texts messages/ e-mails/

oral conversations.

The last argument raised by defendant that the within summary judgment motion must be dismissed because discovery is not complete and defendant's claims "will become more evident after plaintiff is deposed," is insufficient to warrant dismissal and/or a denial of consideration of that part of the motion seeking to strike affirmative defenses and/or dismissal of counterclaims. In order to be entitled to a denial of summary judgment on grounds that the application is premature because discovery has not taken place, there must first be a showing that information exists that may bolster, support or assist in defending against the motion application. No such showing has been demonstrated here by defendant and a wishful desire that something may be revealed during discovery cannot defeat the consideration of the motion for summary judgment.

Here, the purported factual disputes (whether an oral promise was made; whether plaintiff is entitled to use and occupancy from defendant; the cost of upkeep of the property; and whether plaintiff voluntarily abandoned the premises etc.) have been herein resolved as legally insufficient and/or are the subject of an accounting hearing wherein the disputes regarding the amounts contributed by each party will be resolved by a Referee who will perform an accounting of the properties' expenditures and each parties' contribution therein.

Defendant need not pay plaintiff use and occupancy for to live in the apartment occupied by defendant for the past eleven years. The fact is, plaintiff has failed to demonstrate entitlement to use and occupancy from defendant – especially in light of the fact that plaintiff never affirmatively states that a demand for payment of use and occupancy was ever made, nor proper notice for payment of use and occupancy from defendant, every served on defendant. Plaintiff's assertion that the parties' orally agreed that defendant would pay the market rate for the use of the apartment, also violates the

statute of frauds and plaintiff failed to demonstrate an ouster from the premises to support the claim for use and occupancy (see *Cohen v Cohen*, 297 AD2d 201, 746 NYS2d 22 [2002]).

In this case, it is clear to this Court that the parties are not entitled to a division of one half interest of the property when one party has substantially contributed more than another. This Court will grant the application to appoint a Receiver to compute the property interest attributable to each party. To the extent that defendant contends that since plaintiff's voluntary departure from the premises defendant has solely contributed to the property's maintenance and upkeep, defendant has rebutted the presumption that incident to partition, plaintiff is entitled to equal shares of the net proceed upon sale (see *also Laney v Siewert* 26 AD3d 194, 810 NYS2d 436 [2006]). The parties' equitable share of the net proceeds is not amenable to resolution by summary judgment and instead should be resolved at a hearing where upon the evidence, the equities and distributions of the proceeds after sale, if any, can be adjusted accordingly (*McVicker v Sarma*, 163 AD2d 721, 722, 558 NYS2d 997 [1990]).

This Court opines that at this juncture, plaintiff's *prima facie* entitlement to a partition has been rebutted by defendant's assertions and undisputed claims of having been the sole caretaker of the property for the past eleven years (see also *Garcia-Valera v McLendon*, 2010 NY Slip Op 326234 [New York County, 2009]). However, for the foregoing reason, plaintiff is entitled to an accounting of the property (*Tedesco v Tedesco*, 269 AD2d 660, 661, 702 NYS2d 459 [2000], lv dismissed 95 NY2d 791, 733 NE2d 230, 711 NYS2d 158 [2000]; Deitz v Deitz, 245 AD2d 638, 639, 664 NYS2d 868 [1997]). The accounting should take into consideration the actually financial contributions of the parties, as well as the non-financial contributions to the property, which shall include but is not limited to the income and expenses of the property, insurance costs, taxes, rents,

maintenance costs, property management costs and/or management costs incident to the construction/repairs and improvements of the property. It is noted that plaintiff agrees that if a sale of the property is directed, that the proceeds of said sale be divided in accordance with the parties' property rights and interests - neither of which can be determined from the papers submitted in support of, or in opposition to, the within summary judgment motion application, necessitation a hearing on the matter to be conducted by a Referee herein duly appointed.

Accordingly, it is

ORDERED that plaintiff's motion, is granted and denied, in part; and is further

ORDERED that plaintiff's motion for a judgment to partition the property for sale at public auction, is denied, at this juncture; and it is further

ORDERED that defendant's affirmative defenses are hereby stricken; and it is further

ORDERED that defendant's counterclaims are hereby dismissed; and it is further

ORDERED that this matter is referred to **Special Referee, Jeffrey A. Helewitz** to hear and determine the accounting of the property and to hear and report on the parties' property rights and interests, including a recommendation as to whether or not a partition and sale at auction is the proper remedy for this dispute; and it is further

ORDERED that counsel for the 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 (Room 119M), who is directed to place this matter on the appointed Special Referee's Part for the earliest convenient date.

DATED: January 22, 2013

ENTER:

FILED

JAN 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Joan M. Kenney, JSC