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SHORT FORM ORDER

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INDEX No. 11-29090

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J. J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-7-13
MOTION DATE 3-6-13
ADJ. DATE 4-3-13
Mot. Seq. # 004 - MG
005 - XMD

WILLIAM GILLOOLY,

Plaintiff,

- against -

RICHARD GILLOOLY,

Defendant.

CIARELLI & DEMPSEY P.C.
Attorney for Plaintiff
737 Roanoke Avenue
Riverhead, New York 11901

KEEGAN & KEEGAN, ROSS & ROSNER, LLP
Attorney for Defendant
315 Westphalia Avenue
Mattituck, New York 11952

Upon the following papers numbered 1 to 40 read on this motion for summary judgment and appointment of a Referee and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers 24 - 36; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 37 - 40; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting plaintiff summary judgment on his complaint and an interlocutory order appointing a Referee pursuant to RPAPL § 911 is granted; and it is further

ORDERED that this cross motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint is denied; and it is further

ORDERED that Gabrielle M. Vizzelini Esq. with an office at 1 Suffolk Ave, Hauppauge Bays NY 11946 is hereby appointed Referee to ascertain and report as to the rights, shares and interests of the parties in the real property described in the complaint; to perform

an accounting; and to report whether the property or any part thereof is so circumstanced that a partition of the property cannot be made without great prejudice to the owners, and to take testimony on such matters, if necessary; and it is further

ORDERED that the Referee shall be empowered to hold hearings regarding any issues related to the completion of his accounting; and it is further

ORDERED that the Referee shall ascertain and report whether there is any creditor not a party who may have or has a lien on the undivided share or interest of any party; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee (~~In the discretion of the Court a fee of _____~~) for his or her determination of the parties' respective rights, shares and interests in the real property described in the complaint and performance of an accounting; and it is further

Subject to further approval of the Court,

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation").

This is an action for the partition of real property located at 75 Willow Street, Orient, Town of Southold, New York and 2220 Village Lane, Orient, Town of Southold, New York pursuant to Real Property Actions and Proceedings Law (RPAPL) article 9 and for the use and occupancy or rental of said premises. Plaintiff and defendant, brothers, became owners as tenants in common of both properties by deed dated May 21, 1973. Said deed was recorded on May 22, 1977 at the Suffolk County Clerk's office. Plaintiff resides in New Jersey, defendant resides at 75 Willow Street.

Plaintiff commenced this action on September 15, 2011. By his complaint, plaintiff seeks, in his first cause of action, partition of the subject properties according to the parties' respective one-half interest in the properties as tenants in common or, in the alternative, if partition cannot be made without great prejudice to the parties, that plaintiff be awarded judgment directing the sale of said properties and a division of the proceeds based on the respective rights and interests of the parties after payment of all costs in this action. Plaintiff alleges in his second cause of action that he was involuntarily precluded from occupying or using said properties by defendant since 2008 such that defendant is liable to plaintiff for all rentals received and for defendant's exclusive use and occupancy of the properties since 2008 less one-half of any payments made by defendant for maintenance, upkeep and repair. Plaintiff further seeks an accounting for the subject properties.

Defendant denies in his answer that the parties own the subject properties as tenants in common with undivided one-half interests and that plaintiff was involuntarily precluded from occupying or using said properties since 2008. He asserts an affirmative defense that by deed dated June 1, 1977 executed by plaintiff and delivered to defendant, plaintiff conveyed all of his right, title and interest in the subject properties to defendant.

The Court's computerized records indicate that the note of issue in this action was filed on April 11, 2013.

Plaintiff now moves for summary judgment on his complaint and for the appointment of a Referee pursuant to RPAPL § 911 to determine whether the properties can be partitioned according to the parties' respective undivided one-half interest in the properties or, to find that partition cannot be made without great prejudice to the parties such that the properties should be sold and the proceeds should be divided based on the respective rights and interests of the parties. In response to defendant's affirmative defense, plaintiff asserts that the unrecorded June 1, 1977 deed was held in escrow as consideration for defendant's fulfillment of the terms and conditions of a 2009 settlement agreement between them and that defendant defaulted under the terms of said agreement resulting, in effect, in the cancellation of said deed. Plaintiff argues that there was no unconditional delivery by him or unconditional acceptance by defendant of the 1977 deed, that the 1977 deed was not given as security and thus did not become a mortgage under the agreement, that the evidence shows that no transfer of title was intended by the parties in 1977, and that the agreement establishes that plaintiff retained his interest as co-owner of the properties and his claim for damages upon defendant's default. In support of the motion, plaintiff submits, among other things, his affidavit, the pleadings, the deed dated May 21, 1973 deeding the two properties to plaintiff and defendant, the deed dated June 1, 1977 executed by plaintiff deeding his interest in the subject properties to defendant, the deposition transcript of defendant, and the Settlement Agreement and Release of Claims (Settlement Agreement) dated September 29, 2009.

Defendant cross-moves for summary judgment dismissing the complaint on the ground that upon delivery of the June 1, 1977 deed to defendant by plaintiff's attorney with correspondence dated June 1, 1977, plaintiff no longer had title to the subject properties, and thus has no standing to maintain this partition action. Defendant's submissions in support of his cross motion include his affidavit, the pleadings, and plaintiff's deposition transcript.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

By his affidavit, plaintiff informs that when the parties purchased the subject properties in 1973, the Willow Street property was improved by one main winterized residence and four out-buildings and the Village Lane property was improved by a one-story, one-bedroom cottage and a two-story, two-bedroom cottage. He explains that the Village Lane cottages were never winterized and that there is one well located on the Willow Street property which services both properties. In addition, plaintiff informs that upon

closing, the parties moved into the home on Willow Street and that during the summers they rented the Village Lane cottages and used the rental income to support both properties. Plaintiff adds that the properties were encumbered by a 25-year term mortgage and that the bank held their tax and insurance payments in escrow.

Plaintiff avers that he signed a deed in June 1977 which was intended to allow the transfer of plaintiff's half ownership of the properties to defendant in 1977 provided that defendant paid plaintiff cash representing plaintiff's equity and removed plaintiff as the co-borrower on the mortgage. He emphasizes that both conditions had to be met for the deed to be effective so as to enable plaintiff to purchase his own home in Orient. Plaintiff notes that the 1977 deed was never recorded. Plaintiff rejects defendant's assertions that he paid plaintiff for the deed, noting a lack of proof, and that he did not remove plaintiff as obligor on the mortgage because he instead satisfied the mortgage, noting that the mortgage was never satisfied in 1977, rather it was satisfied in March 1998 at the end of its 25-year term.

Plaintiff also explains that in conjunction with negotiations following the depletion of the estate of their stepmother by defendant which negotiations were for the purposes of obtaining restitution of plaintiff's share of the estate, the parties entered into a Settlement Agreement in 2009. According to plaintiff, the terms of said Agreement required defendant to deliver the 1977 deed into escrow and provided that said deed would be destroyed in the event that defendant failed to pay plaintiff the sum of $901,058.00, that plaintiff had agreed to accept as restitution, within one year from May 2010. Plaintiff asserts that it is undisputed that defendant defaulted and never paid his full debt to plaintiff and that as a result plaintiff retained his undivided one-half interest in the subject properties as evidenced by the last recorded deed in the chain of title and that defendant forfeited any right to delivery of the 1977 deed.

Defendant avers in his affidavit that as consideration for the delivery of the 1977 deed, defendant gave plaintiff a check payable to plaintiff in the amount of approximately $40,000.00, which check defendant has been unable to locate. In addition, defendant contends that plaintiff's assertion that he was to be removed from the mortgage as a condition of the conveyance is false as evidenced by the letter dated June 1, 1977 from plaintiff's attorney, and that satisfaction of the mortgage was not a condition of conveyance. According to defendant, the 1977 deed was not recorded because plaintiff did not want to pay the resulting capital gains tax. Defendant asserts that there was no agreement other than that plaintiff would convey his interest in the properties to defendant for approximately $40,000.00. With respect to the 2009 Settlement Agreement, defendant claims that he did not personally deliver the 1977 Deed to plaintiff's attorney, the law firm of Scarinci Hollenbeck, but that he believed that his attorney, Gordon Meyer, had been holding the unrecorded deed in his file from the time prior to 1999 that he had given it to Mr. Meyer for safekeeping and that Mr. Meyer turned over the deed to plaintiff's attorney.

The 2009 Settlement Agreement includes in the "Recitals" section "Whereas, William [plaintiff] has previously delivered a Deed dated June 1, 1977 to Richard [defendant] conveying all of William's right, title and interest in certain premises located at Orient, Town of Southold, County of Suffolk, State of New York ("Deed"); and Whereas, such Deed has not been recorded or filed. A true and accurate copy of the Deed is attached hereto as Exhibit A; and ..."

Then, in the "Agreements" section it provides

"NOW, THEREFORE, in consideration of the above Recitals, Agreements and Releases contained herein, and for other good and valuable consideration, the Parties agree as follows:

1. Settlement Amount and Payment.

(a) Richard has previously delivered the Deed to the law firm of Scarinci Hollenbeck. The Deed shall be held in escrow as described hereinbelow."

The parties also agreed in paragraph (1) (c) that property located at 950 Tabor Road, Orient, titled to defendant and listed for sale for the sum of $1,100,000.00, would be sold and that the proceeds would be distributed as follows: (1) to satisfy the existing mortgage in the face amount of $400,000.00, (2) to pay any fees relating to the sale, (3) $75,000.00 to defendant, and (4) the remainder of the proceeds to plaintiff up to the amount owed by defendant which was agreed to be $901,058.06.

Paragraph (1) (d) of the Agreement provided that in the event that the amount paid to plaintiff pursuant to paragraph (1) (c) was insufficient to satisfy the full amount due to plaintiff, defendant would execute and deliver a note for the balance of the amount due to plaintiff. Paragraph (1) (d) further provided that

> The Note shall bear simple interest at a rate of 6% per annum. The Note shall be secured by the Deed attached hereto as Exhibit A and shall be for one year from such time as the Note is executed. In the event that Richard shall fail to pay in full the Note in accordance with its terms, upon receipt of written notice from William so certifying such failure of Richard to pay the Note in accordance with its terms, the Escrow Agent shall immediately deliver to William the Deed and the Deed shall no longer have any force and effect and William shall forthwith destroy such Deed. William will then be entitled to force the sale of the property and be entitled only to the amount due him under the Note (the balance of Richard's debt) with interest and any related fees.

Pursuant to paragraph (1) (e) of the Agreement, "In the event Richard shall pay in full the Note provided for in Paragraph (1) (d) in accordance with its terms, upon receipt of written notice from William so certifying such payment, the Escrow Agent shall immediately deliver the Deed to Richard, together with such other documents as are reasonably required to transfer title, who shall forthwith record same and William shall have no further interest in the premises described in the Deed attached hereto as Exhibit A."

Finally, the parties agreed in Paragraph 11 that "This Agreement represents the entire agreement between the Parties and supercedes all prior negotiations, representations or agreements between the Parties, either written or oral, on the subject hereof. This Agreement may be amended only by written instrument designated as an amendment to this Agreement and executed by the Parties hereto."

General Obligations Law § 5-703 (1) provides that "[a]n 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." When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]).

Pursuant to the express terms of the 2009 Settlement Agreement signed by both parties, the 1977 Deed was held in escrow by plaintiff's attorney to serve as security for the note to be given by defendant to plaintiff if there was an outstanding amount of debt due to plaintiff after the sale proceeds of the Tabor Road property were used to satisfy the items in paragraph (1) (c).

"It is well established that transfer of title is accomplished only by the delivery and acceptance of an executed deed" (***ERHAL Holding Corp. v Rusin***, 229 AD2d 417, 419, 645 NYS2d 93 [2d Dept 1996], citing Real Property Law § 244; *see* ***Manhattan Life Ins. Co. v. Continental Ins. Co.***, 33 NY2d 370, 353 NYS2d 161[1974]; *see also*, ***Ten Eyck v Whitbeck***, 156 NY 341, 50 NE 963 [1898]; ***D'Urso v Scuotto***, 111 AD2d 305, 489 NYS2d 294 [2d Dept 1985]). When a deed is delivered to be held in escrow, the actual transfer of the property does not occur until the condition of the escrow is satisfied and the deed is subsequently delivered to the grantee by the escrow agent (*see* ***Caulfield v Improved Risk Mutuals, Inc.***, 66 NY2d 793, 497 NYS2d 903 [1985]; ***Scartozzi v Scartozzi***, 50 AD3d 662, 856 NYS2d 154 [2d Dept 2008]; ***McLoughlin v McLoughlin***, 237 AD2d 336, 654 NYS2d 407 [2d Dept 1997]).

Here, there is no evidence that the condition of the escrow was ever satisfied. Plaintiff argues that he received only $216,722.74 in the form of two checks dated May 21, 2010 from defendant from the proceeds of the sale of the Tabor Road property, one in the sum of $201,418.68 and another in the sum of $15,354.06, which have been submitted with the motion papers, and that defendant defaulted with respect to the rest of the amount due to satisfy his $901,058.06 debt. In contrast, defendant testified at his deposition that the remainder of the debt was satisfied through a credit of a payment made prior to the date of the Settlement Agreement, September 29, 2009. According to defendant, the credit consisted of funds from a mortgage obtained on the Tabor Road property that defendant advanced to plaintiff to build a house on said property. Defendant testified to events that occurred prior to the execution of the 2009 Agreement as proof that he had satisfied the outstanding debt to plaintiff. However, based on the express terms of the Agreement, the remainder of the outstanding debt was to be paid through the execution and delivery of a one-year note for the balance of the amount due at an interest rate of 6 percent per annum. Notably, there is no evidence in the record that defendant ever executed and delivered such a note or that plaintiff took any action to enforce the 2009 Agreement by demanding a note from defendant after May 21, 2010. Plaintiff's attorney indicates by reply affirmation that plaintiff destroyed the original 1977 Deed.

Inasmuch as conditional conveyances are not recognized in this state (*see* ***Herrmann v Jorgenson***, 263 NY 348, 353, 189 NE 449 [1934]; ***Hamlin v Hamlin***, 192 NY 164, 167-168, 84 N.E. 805 [1908]; ***Goodell v Rosetti***, 52 AD3d 911, 913, 859 NYS2d 770 [3d Dept 2008]), plaintiff continues to hold title his

undivided one-half interest in the subject properties (*see* ***TDNI Properties, LLC v Saratoga Glen Builders, LLC***, 80 AD3d 852, 914 NYS2d 746 [3d Dept 2011]).

One who holds an interest in real property as a tenant-in-common may maintain an action for partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners (*see* RPAPL 901[1]; ***Piccirillo v Friedman***, 244 AD2d 469, 664 NYS2d 104 [2d Dept 1997]; ***Bufogle v Greek***, 152 AD2d 527, 543 NYS2d 152 [2d Dept 1989]). "Partition, although statutory (RPAPL 9), is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale" (***Freigang v Freigang***, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (*see* ***Worthing v Cossar***, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). These include acquisition payments, such as down payments and mortgage payments (*see* ***Quattrone v Quattrone***, 210 AD2d 306, 307, 619 NYS2d 773 [2d Dept 1994]; ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893 [3d Dept 1973]; *see also* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property, if they were made in good faith and are of substantial benefit to the premises (*see* ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see* ***McIntosh v McIntosh***, 58 AD3d 814, 872 NYS2d 490 [2d Dept 2009]; ***Misk v Moss***, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]).

Thus, plaintiff is vested in title as tenant in common with the defendant with an undivided one-half interest in the subject property and is entitled to maintain an action for partition and sale of the property as a matter of right (*see* RPAPL Article 9; ***Tedesco v Tedesco***, 269 AD2d 660, 702 NYS2d 459 [3d Dept 2000]).

Accordingly, the motion by plaintiff for summary judgment on his complaint and an interlocutory order appointing a Referee pursuant to RPAPL § 911 is granted and the cross motion by defendant for summary judgment in his favor dismissing the complaint is denied.

Dated: 15 July 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION