

Bogoni v Gomez

2014 NY Slip Op 31818(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 113493/2010

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: L.B. York
Justice

PART 2

Bogoni

INDEX NO. 113493/P

-v-
Gomez

MOTION DATE _____

MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance
with the accompanying decision

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

FILED

JUL 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/14

L.B. York, J.S.C.

LOUIS B. YORK

- 1. CHECK ONE: CASE DISPOSED
- 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

NON-FINAL DISPOSITION
J.S.C.

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----x
Paul Bogoni,

Plaintiff,

Index No. 113493/2010

against-

Vicdania Gomez,

Defendant.
-----x

FILED

JUL 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

York, J:

According to both parties, plaintiff and defendant began a romantic relationship in 2004 and ended it in 2010. In 2005 the parties together acquired an apartment at 135 W. 79th Street, ("79th Street Apartment"). Plaintiff and defendant paid \$650,000 for the 79th Street Apartment. Plaintiff contributed \$510,000, and defendant contributed \$140,000.

The relationship also produced a child in 2008. Not long after the birth of the child, the parties acquired a second, larger apartment at 755 West End Avenue ("755 West End"). The property is deeded to both parties as tenants in common and the cooperative shares lists them as joint owners. The parties purchased the apartment October 17, 2008, which sold for \$1,450,000. Plaintiff paid the purchase price of \$1,450,000. Plaintiff asserts that defendant was to sell the 79th Street apartment in order to repay him her half of the purchase

price. In support he submits two documents: one, an October 13, 2008 letter from defendant's lawyer stating that if defendant did not repay plaintiff he would remove her from the sales contract; and two, a December 9, 2010 communication, which both plaintiff and defendant signed and which states that the parties reached an agreement regarding all unresolved disputes relating to the 79th Street apartment, 755 West End Avenue, and another property. Plaintiff does identify the documents that, according to the letter, were to effectuate the parties' agreement; however, the stipulation as to child support is dated 10 days after this communication. The Court cannot locate anything that shows plaintiff removed defendant's name from the sales contract or other pertinent documents.

After the parties' breakup, disputes ensued regarding plaintiff's obligation to pay child support and the parties relative interests in 755 West End. Ultimately the parties resolved some of their disagreements through a stipulation. As it relates to 755 West End Avenue, the agreement states:

For so long as: (i) the Father is alive, (ii) *the Mother resides at 755 West End . . . and (iii) the Mother and Father are joint owners of The Apartment*, the Father will pay the Mother's fifty (50%) percent of the maintenance cost and any assessments on that residence . . . and she agrees to allow him to deduct same from the monthly Basic Child Support Obligation. . . .

So-Ordered Stip. of Dec. 9, 2013 (emphasis supplied). Other than the above and the statements that defendant currently resides in the apartment and that

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defendant is to receive all notices at the West End address, there is no other mention of 755 West End in the 20-page stipulation.

Plaintiff claims co-ownership of 755 West End, and in this lawsuit he seeks a partition of the 755 West End apartment and sale of the unit. As proof of damages and of plaintiff's interest in the property, plaintiff submits email documents detailing the agreement with defendant; the deed to 755 West End, which lists the parties as co-owners; and a stock certificate in the co-op building, which lists the parties as co-owners. Plaintiff further claims that defendant changed the locks to the apartment, effectively dispossessing him of 755 West End. At present, there has been no accounting and valuation of the property.

In her answer, defendant states that she is the sole owner of 755 West End. She bases this assertion on plaintiff's alleged promise to her, which she states he repeated on numerous occasions. Moreover, she states, because of plaintiff's representation regarding her ownership status she spent over \$200,000 on improvements, supervising the work in her capacity as general contractor. Defendant further states that after their relationship ended, plaintiff promised her ownership of 755 West End in exchange for favorable child support payments.

Currently, plaintiff brings a motion for partial summary judgment in which he seeks an interlocutory judgment directing the sale of the 755 West

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End apartment and a division of the proceeds. In addition, plaintiff asks for dismissal of defendant's counterclaims for constructive trust and damages. The Court denied plaintiff's 2012 motion for interlocutory judgment as premature and stated that there may be an issue of fact as to whether a constructive trust exists. Now, discovery has been completed and the Note of Issue has been filed, and plaintiff contends interlocutory judgment is now appropriate. Plaintiff does not seek summary judgment on the issue of the percentage of the proceeds that each party will receive from the sale, as this is not amenable to resolution prior to a determination of the equities. See Laney v. Siewert, 26 A.D.3d 194, 194-95, 810 N.Y.S.2d 436, 437 (1st Dept. 2006).

Defendant opposes this motion, claiming that a constructive trust exists because plaintiff promised her sole ownership of 755 West End and she relied on his promise when the parties negotiated the child support agreement. She notes that plaintiff's earlier motion was denied and this one is virtually identical, and that it contains no additional evidence that refutes her constructive trust defense. Among other things, she argues that the December 2013 stipulation determining child support does not waive her counterclaims which assert, in part, that she reduced the child support payments because of defendant's promise that 755 West End was solely hers. She also reiterates that, also due to defendant's promise she undertook a great deal of work and spent an enormous amount of money on improvements to the apartment. At the least,

she argues, these assertions create an issue of fact regarding her counterclaim for the imposition of a constructive trust, and therefore plaintiff's motion should be denied.

Analysis

Someone who possesses real property as a tenant in common may bring an action for partition, or division, of the property. Gabay v. Bender, 24 A.D.3d 133, 804 N.Y.S.2d 680 (1st Dept. 2005). A complaint for partition of real property exists under the Section 9 of the Real Property Actions and Proceedings Law (RPAPL), applies to cooperative apartments, and can be litigated in the Supreme Court. See Chiang v. Chang, 137 A.D.3d 371, 529 N.Y.S.2d 294 (1st Dept. 1988). When a physical division of the property would cause undue hardship, then a party may seek a partition by sale and division of proceeds. Manganiello v. Lipman, 74 A.D.3d 667, 668, 905 N.Y.S.2d 153, 155 (1st Dept. 2010). A party can establish the right to partition by establishing his or her interest in the property, but the Court considers the equities before it reaches a decision as to whether a partition and sale of the property is appropriate. Id. However, the argument that a defendant would suffer adverse consequences as the result of a sale is insufficient to warrant denial. Id. at 669, 905 N.Y.S.2d at 155.

Here, a physical partition of the apartment is not possible without undue hardship. Moreover, neither party seeks a physical division of the apartment.

On the contrary, defendant argues that she is entitled to full ownership of the apartment – or, in the alternative, the exclusive right to reside there until her daughter reaches majority. Thus, plaintiff is entitled to partition and sale unless defendant is able to raise equitable considerations that show the apartment should not be sold.

Defendant argues that entered into a less favorable child support agreement because plaintiff ceded sole ownership of the apartment to her. However, the parties' child support agreement, which also resolves matters relating to the West End apartment, lists them as tenants-in-common. A tenancy in common exists when two or more persons each own and possess *an undivided interest* in property, real or personal.” Chiang v. Chang, 137 A.D.2d 371, 373 n1, 529 N.Y.S.2d 294, 295 n1 (1st Dept. 1988). Therefore, defendant's contention fails.¹ Her statement that she spent over \$200,000 on renovations and repairs because she believed she was the sole owner of the apartment is belied by the bills plaintiff submitted in response, which show that he paid most of the bills for this work. It is not clear whether defendant oversaw and/or performed the work. She may raise this argument, as well as any relating to her costs relating to the apartment, at the hearing that shall take

¹ The agreement also apparently resolves the parties' dispute over ownership in that it treats the parties as co-owners. As the Court already noted, plaintiff disputed defendant's status as co-owner when she failed to pay half of the purchase price. However, the agreement post-dates the stipulation which states the parties resolved this dispute.

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place after the sale, in order to determine an equitable distribution of the proceeds.

Plaintiff also has failed to show that a constructive trust is warranted on these bases. Before a Court imposes a constructive trust, it must find “(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment.” Tompkins v. Jackson, Index No. 102255-2006, 20 Misc. 3d 1108(A), 866 N.Y.S.2d 96 (table) (Sup. Ct. N.Y. County May 14, 2008)(avail at 2008 WL 51285, at *5). For reasons similar to those above, the Court concludes that defendant has not demonstrated her right to a constructive trust. Compare with Massey v. Byrne, 112 A.D.3d 532, 532, 977 N.Y.S.2d 242 (1st Dept. 2013)(credible evidence that plaintiff moved across the country, sacrificed work opportunities and spent time on business in question raised issues of fact on issue of constructive trust).

Defendant alternatively points out that the parties’ child also resides in the apartment and she argues that this alone justifies barring sale of the apartment. However, defendant sets forth the consideration without further analysis, as if the fact that her daughter resides there – by itself – means that she cannot move until the daughter reaches majority. For a persuasive argument, defendant must show that any sale would have an unduly harsh impact on her daughter. Plaintiff notes that defendant owns the three-room apartment located at West 79th Street so has an alternative residence.

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Defendant argues that the second apartment is smaller and would be more crowded, but this inconvenience does not tip the balance of equities in her favor where, as here, she and her daughter have another place to live. Moreover, pursuant to the child support agreement the parties' daughter shall attend private or parochial school until she enters college, all at plaintiff's expense; thus, a move will not cause the child to change schools or undergo related disruptions. As the child's support payments will increase by over \$2000 a month following the sale, and so defendant will have more money for the child's necessities, including maintenance. Plaintiff also notes that defendant can sell the West 79th Street apartment and find an alternative residence – either through rent or purchase – that would obviate her objections. The Court has sympathy for the child, who remains in the middle of her parents' dispute and whose true equitable concerns have not been addressed by either party. However, as a matter of law defendant has not raised a triable issue.

The Court notes that it has considered all the parties' arguments – whether discussed here or not – at length, particularly in light of its concern for the child's best interest. Accordingly, the Court grants the motion for partition and sale and directs plaintiff to settle order on notice. Following the sale, there shall be a full accounting – upon formal application – at which point the fair distribution of the proceeds will be evaluated, in accordance with this decision

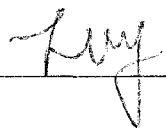
and with all evidence the parties submit.

ENTER:

Dated: 7/9/14

FILED

JUL 14 2014



Hon. Louis B. York, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.