SHORT FORM ORDER INDEX NO. 23718/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST,

Plaintiffs,

-against-

PETER PAUL HOSHYLA,

Defendant.

ORIG. RETURN DATE: OCTOBER 1, 2015
FINAL SUBMISSION DATE: OCTOBER 29, 2015
MTN. SEQ. #: 005
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
FARLEY & KESSLER, P.C.
55 JERICHO TURNPIKE - SUITE 204
JERICHO, NEW YORK 11753
516-433-4220

DEFT'S/RESP ATTORNEY:
LEO P. DAVIS, P.C.
442 MAIN STREET
P.O. BOX 425
EAST MORICHES, NEW YORK 11940
631-878-8000

Upon the following papers numbered 1 to 7 read on this motion TO DISCONTINUE SECOND CAUSE OF ACTION AND FOR OTHER RELIEF. Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Memorandum of Law in Opposition 6; Reply Affirmation 7; it is,

**ORDERED** that this motion by plaintiffs, ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST ("plaintiffs"), for an Order:

(1) pursuant to CPLR 3217 (b), permitting plaintiffs to discontinue the Second Cause of Action seeking rescission; and

(2) pursuant to CPLR 3025, permitting plaintiffs to amend and serve a Verified Reply in the form annexed to assert additional affirmative defenses of lack of jurisdiction and statute of limitations; and

(3) pursuant to CPLR 3212, granting plaintiffs summary judgment dismissing defendant's counterclaim seeking specific performance and monetary damages for breach of contract on the grounds of lack of jurisdiction and expiration of statute of limitations; and

(4) pursuant to CPLR 3212, granting plaintiffs summary judgment on their First Cause of Action seeking partition of seven involved parcels, which formerly comprised the Hoshyla Family Farm on South Street in Manorville, New York, as follows:

- Tax Lot 20.002 (Farm House)
- Tax Lot 20.003 (Building Lot)
- Tax Lot 20.004 (Lot surrounding defendant's property)
- Tax Lot 20.005 (Farmland subject to TDR)
- Tax Lot 20.006 (Farmland subject to TDR)
- Tax Lot 20.004 (Farmland subject to TDR)
- Tax Lot 20.005 (Farmland subject to TDR)
- Tax Lot 20.006 (Farmland subject to TDR)
- Tax Lot 20.008 (Small parcel adjacent to Farm House)

(5) in the alternative, should the Court deny the relief sought by plaintiffs in paragraphs 3 or 4 above, then, pursuant to CPLR 2221 (d) and (e), and 5015 (a) (4), granting reconsideration of plaintiffs' motion which was decided by Order of this Court dated April 21, 2015, and, upon reconsideration, dismissing defendant's counterclaim for failure of jurisdiction and expiration of statute of limitations,

is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition to this application from defendant PETER PAUL HOSHYLA.

The Court shall address each request for relief made by plaintiffs *seriatim*.

## I. Discontinuance of Second Cause of Action for Rescission

Plaintiffs seek an Order granting permission to discontinue the Second Cause of Action for rescission. The time has long passed for

discontinuance as of right, and the parties have not stipulated to a discontinuance. As noted, defendant has submitted opposition to this application.

CPLR 3217 (b) provides in pertinent part that under the circumstances presented here discontinuance is obtainable:

> (b) By Order of Court.
>
> . . . an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper

(CPLR 3217 [b]).

Plaintiffs do not seek to discontinue the entire action against defendant, but only that portion of the action for rescission. Given the Court's prior ruling concerning plaintiffs' repudiation of the contract in question, the Court is reluctant to permit a withdrawal of the very cause of action which served as the basis for the finding of repudiation. As a consequence of their having commenced an action for rescission, and now some five years later, the Court finds that to allow the discontinuance would cause prejudice.

The Court is mindful that it could be argued that a discontinuance would annul the bringing of the cause of action for rescission and affect the efficacy of rescission as repudiation. The Second Department has recently held that "[i]n general, '[w]hen an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified' " (*Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 549 [2014], quoting *Newman v Newman*, 245 AD2d 353, 354 [1997]). For the purpose of avoiding such possibility, that branch of plaintiffs' motion which seeks an Order of discontinuance as to the Second Cause of Action, is **DENIED**.

## II. Leave to Serve a Supplemental Verified Reply

Plaintiffs further seek leave to amend their Reply to Counterclaim for the purpose of interposing the affirmative defenses of lack of jurisdiction and statute of limitations. Plaintiffs claim that the proper party has not been named in

the counterclaim, and that the period of limitation has passed. However, the repudiation by the named plaintiffs as it concerns their intention to either honor or disavow the contract of sale entered into by Anna Carr and binding upon her heirs compels this Court to allow the amendment of the pleading. The amendment, however, is not determinative of the ultimate issue.

As the Second Department held in *Deutsche Bank Trust Co. Ams. v Cox*, 110 AD3d 760 (2013):

> Here, the defendant initially did not raise in his answer a defense based upon lack of personal jurisdiction, lack of standing or a capacity to sue, or the statute of limitations. Hence, those affirmative defenses were waived at that point (*see* CPLR 3211 [e]). However, defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay and is not palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Aurora Loan Servs., LLC v Dimura*, 104 AD3d 796, 797, 962 NYS2d 304 [2013]; *U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724, 933 NYS2d 293 [2011]; *Complete Mgt., Inc. v Rubenstein*, 74 AD3d 722, 723, 903 NYS2d 439 [2010]; *Lucido v Mancuso*, 49 AD3d 220, 222, 851 NYS2d 238 [2008]). " 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714, 716, 815 NYS2d 621 [2006], quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, 459 NE2d 164, 471 NYS2d 55 [1983]; *see Aurora Loan Servs., LLC v Dimura*, 104 AD3d at 797)

(*Deutsche Bank Trust Co. Ams. v Cox*, 110 AD3d 760, 762 [2013]).

There are outstanding discovery requests and third-party subpoenas which may impact upon the issues relative to proper parties to this action and

concomitantly issues of periods of repose. That portion of plaintiffs' motion to amend their pleading is **GRANTED**. Plaintiffs' Supplemental Verified Reply to Defendant's Counterclaim, annexed to plaintiffs' moving papers as Exhibit "4," shall be deemed served upon defendant as of the date of service of the instant Order upon defendant with notice of entry.

## III. Summary Judgment Dismissing Defendant's Counterclaim

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

Here, there is a proposed new pleading which has been allowed by the Court which must be the subject of appropriate and meaningful discovery. "[T]he parties have not been afforded an opportunity to conduct discovery with respect to the amended answer. Under the circumstances of this case, therefore, the plaintiff's motion for summary judgment on the complaint must be denied, with leave to renew upon the completion of discovery" (*Deutsche Bank Trust Co. Ams.*, 110 AD3d at 762).

## IV. Summary Judgment on Plaintiffs' First Cause of Action for Partition

Defendant correctly argues that the existence of the contract of sale and its related obligations as to purchase money as well as contemplated deed transfers is an absolute lien upon the parcels and precludes the granting of summary judgment as there are issues which may only be determined upon the completion of discovery, certification of the case, and trial. Moreover, in some circumstances, the right to partition pursuant to RPAPL 901 (1) must yield to the well-recognized exception that "equity will not award partition to a party in violation of his [or her] own agreement" (*McNally v McNally*, 129 AD2d 686, 687 [1987]; *see Chew v Sheldon*, 214 NY 344, 348-349 [1915]). "An agreement not to partition may be implied . . . where an action for partition would tend to defeat the performance of a contract" (24 NY Jur 2d, Cotenancy and Partition § 130; *see Tramontano v Catalano*, 23 AD2d 894 [1965]; *see generally Bessen v Glatt*, 170 AD2d 924 [1991]; *Tuminno v Waite*, 110 AD3d 1456 [2013]). As such, plaintiffs' motion for summary judgment on the issue of partition is **DENIED**.

## V. Reconsideration of Plaintiffs' Prior Motion

Plaintiffs argue, in the alternative, that should either or both of the summary judgment applications made herein be denied, they then seek to renew and reargue their prior motion which was decided by Order of this Court dated April 21, 2015. Upon reconsideration, plaintiffs seek dismissal of defendant's counterclaim for failure of jurisdiction and expiration of the statute of limitations. It is undisputed that the time to make such a motion has long since expired. Accordingly, this branch of plaintiffs' motion is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

**Dated: November 18, 2015**

**HON. JOSEPH FARNETI**
**Acting Justice Supreme Court**

____ FINAL DISPOSITION  __X__ NON-FINAL DISPOSITION