Evans v Webb
2015 NY Slip Op 32460(U)
December 31, 2015
Supreme Court, New York County
Docket Number: 153949/2014
Judge: Donna M. Mills

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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DEREK R. EVANS,

Plaintiff,

-against-

RACHELLE WEBB,

Defendant.

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INDEX NUMBER 153949/2014
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

In this action regarding the ownership of a residential property, plaintiff Derek R. Evans moves for summary judgment on the complaint, pursuant to CPLR 3212, which would result in partition and sale of a condominium unit located at 1485 Fifth Avenue, Unit 14J, New York County (the Unit).

FACTUAL BACKGROUND

Plaintiff and defendant Rachelle Webb own, as joint tenants with rights of survivorship, residential condominium unit 14J at 1485 Fifth Avenue, New York County. They became engaged to be married in October 2008, lived together, and acquired the Unit in May 2012. Plaintiff claims that they were still engaged at the time of purchase; defendant claims that the engagement ended before that, in early 2009. It is undisputed that they moved into the Unit together in August 2012. In any case, the engagement was broken, plaintiff left the Unit in or around January 2013, and, currently, only defendant resides there.

The action commenced on April 24, 2014, with the filing of a verified complaint

requesting partition and sale of the unit. Evans aff, exhibit A. An amended verified complaint was filed on June 13, 2014 with no substantial changes. *Id.*, exhibit C.

DISCUSSION

In support of the instant motion, plaintiff submits the "Condominium Unit Deed" granted to the parties; the "Consolidated Adjustable Rate Note" financing the Unit, executed by the parties; a mortgage loan commitment letter addressed to both parties; a joint mortgage loan application, unsigned, but filled out in complete detail; and copies of a monthly coupon from CitiMortgage's automatic payment withdrawal plan in both names, with a July 1, 2015 due date. *Id.*, exhibits D, E and F.

Plaintiff states that he was caused "to permanently vacate the jointly owned Premises," that he has "neither resided at nor been able to use the Condominium Unit for approximately two and a half years," yet, he "continue[s] to be jointly liable for the outstanding mortgage payments owed to Citibank." Evans aff, ¶ 7. He argues that, under these circumstances, he is entitled to partition. *Manganiello v Lipman*, 74 AD3d 667, 668 (1st Dept 2010) ("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"); *Chiang v Chang*, 137 AD2d 371, 373 (1st Dept 1988) ("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").

Where extreme prejudice would result from partition, plaintiff claims that the law prescribes sales of the property, and division of the proceeds. *Lee v Lee*, 79 AD3d 1123, 1123

(2d Dept 2010) ("plaintiffs also made a prima facie showing that the property was so circumstanced that a partition thereof cannot be made without great prejudice to the owners"). New York's Real Property Actions and Proceedings Law (RPAPL) § 901 (1) provides that:

> "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."

Actual possession of the property is not necessary to qualify a party to commence an action for partition and sale. *Feiner v Wolgemuth*, 10 AD2d 175, 178 (2d Dept 1960) ("The right to compel partition and sale of real property . . . will require at least a constructive possession or a present right to deal with the property at pleasure . . .").

Defendant has a very different view of the facts here. She claims that the Unit is her home, purchased with the help of loans from plaintiff, gifts from relatives, his and hers, and plaintiff's signature on the mortgage documents. She stated that the parties started living together in January 2003. Webb tr at 19. However, their engagement had been broken "well before" the purchase. *Id.* at 10. She states that they allegedly had "the understanding that I would refinance the property, repay his loan and have his name taken off the loan documents." Webb aff, ¶ 5. She testified that, at the time of the purchase, the parties had joint checking and savings accounts, dating from about January 2007. Webb tr at 14-15. At her deposition, defendant said that, aside from the Unit's mortgage, the parties no longer had any joint financial account. *Id.* at 27.

According to defendant, plaintiff's stay in the Unit was supposed to be temporary. On January 26, 2013, a dispute about the length of his stay and their finances escalated and resulted in a visit by the police. While plaintiff "was given the option by the police to either stay or leave

. . . Plaintiff willingly left the apartment and has not been a resident since that day." Webb aff, ¶ 5. Defendant maintains that she has since "made all the mortgage payments, insurance payments and the [sic] paid the homeowners maintenance fees for the property." *Id.* She also asserts that she has "initiated efforts to refinance the property and to repay [plaintiff's] initial loan towards the purchase of the property, and to have his name removed from the original documents, which was our agreement." *Id.* She contends that his failure to acknowledge this purported agreement "makes partition illegal and unfair." *Id.* She says that she has "offered to settle the whole case by refinancing the mortgage to take him off, and make it my responsibility alone." *Id.*, ¶ 7.

Defendant submits only a copy of a Family Court Petition, annexed to her affidavit, dated March 13, 2013, for a stay away order. Defendant received several extensions of the temporary order of protection, but admits that it was never served on plaintiff. *Id.*, ¶ 8. The precipitating incident described in the petition was plaintiff's insistence in coming to the Unit to retrieve a vacuum cleaner, an effort that defendant thwarted. She provides no financial documentation to support her position. Even an email message that she allegedly sent plaintiff about "trying to figure out the most equitable way to resolve our asset and liability issues," is submitted as a transcription, not a copy of the original document. *Id.*, ¶ 11. By contrast, plaintiff submits defendant's deposition transcript, along with the financial and legal documents referenced above.

Legal Standards for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case

by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff has met his burden of establishing a prima facie case by presenting undisputed documentation of his joint ownership of the Unit. In opposition, defendant refers to an "understanding" that has no material embodiment. She fails to supply any support for her alleged exclusive financial support of the Unit, since plaintiff's departure, such as canceled checks or receipts for site-related expenses. She offers only her word in attempting to cast doubt on the existence of a triable issue of fact. This is insufficient to deny plaintiff's motion for summary judgment.

The court notes that defendant claims herein to be making "efforts to refinance the property and to repay his [plaintiff's] initial loan towards the purchase of the property." Webb aff, ¶ 5. In order to effect a fair payment to plaintiff, the Unit must be valued. Therefore, decision on the instant motion shall be stayed, and the issue of the value of the Unit, and the consequential payment amount to plaintiff for his share as joint tenant of the Unit, shall be referred to a Special Referee.

Accordingly, it is

ORDERED that the issues of the value of the condominium unit located at 1485 Fifth Avenue, Unit 14J, New York County, and the proper payment amount to be paid to plaintiff for his share as joint tenant of the Unit, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that decision on the motion by plaintiff Derek R. Evan for summary judgment in his favor on the complaint, pursuant to CPLR 3212, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for 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 General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

DATED: **December 31, 2015**

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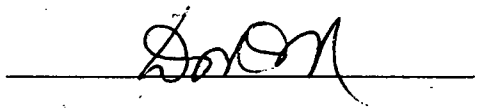

J.S.C.

DONNA M. MILLS, J.S.C.