

<b>Martinez v Fernandez</b>
2018 NY Slip Op 31466(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 152242/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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FAUSTINO MARTINEZ and GUADALUPE  
MARTINEZ,

Plaintiffs,

- v -

ISOLINO C. FERNANDEZ and ISOLINO A.  
FERNANDEZ,

Defendants.

INDEX NO. 152242/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 16, 17, 18, 19, 20, 24,  
25 and 26 were read on the application for summary judgment

HON. BARBARA JAFFE:

Plaintiffs move for an order granting them summary judgment on their claims for the partition and sale of an income property, and an accounting of income and expenses from January 2014 to the present. Defendants solely oppose the sale of the property.

I. PERTINENT FACTS

The property at issue is a residential apartment building located at 122 West 13<sup>th</sup> Street, New York, New York and, as relevant here, the deed to it, dated 1990, provides that plaintiffs and defendants are “joint tenants with the right of survivorship as to an undivided one half interest.” (NYSCEF 8, Exh. B).

In an affidavit offered in opposition, defendant Isolino A. Fernandez states, in relevant part, that:

3. [The parties] have held and managed the apartment building at 122 West 13 Street as a partnership for the past 27 years. Each year, each owner / partner receives from the partnership's accountant a form K-1 showing income and expenses from the property and a 25% interest in the partnership.

4. The partnership files its own tax return tax in the name of all four owners: "Martinez, Faustino & Guadalupe and Fernandez, IA & IC," using its own tax ID number XXXXX7301. (I have redacted the full TID number.) A true and correct copy of redacted portions of the partnership's 2016 tax returns is attached hereto as Exhibit A" . . . .

Defendants also offer excerpts of tax returns allegedly filed by the partnership, and correspondence in which the name of the partnership appears, and in which plaintiffs are referred to as "partners." (NYSCEF 17, 18, 19, 20).

## II. DISCUSSION

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 901(1), a tenant in common "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." A plaintiff establishes a *prima facie* case for summary judgment for partition and sale by demonstrating her ownership and right to possession of the property, and that physical partition cannot be made without great prejudice

(*Manganiello v Lipman*, 74 AD3d 667, 668 [1<sup>st</sup> Dept 2010]; *Donlon v Diamico*, 33 AD3d 841, 841 [2d Dept 2006]; *Dalmacy v Joseph*, 297 AD2d 329, 329 [2d Dept 2002]).

An equitable defense to partition and sale may exist where a defendant offers circumstantial evidence that the property at issue is “in truth and fact” owned by a partnership, rather than by individuals as tenants in common, thus creating an issue of fact as to whether partition and sale is appropriate. (*Vick v Albert*, 17 AD3d 255, 256 [1<sup>st</sup> Dept 2005]; *Benham v Hein*, 50 AD2d 808, 809 [2d Dept 1975]).

Here, plaintiffs establish their ownership and right to possess the property by submitting a copy of the deed in which a one-half interest in the property is conveyed to them, and the validity of which is undisputed. (*See Cadle Co. v Calcador*, 85 AD3d 700, 702 [2d Dept 2011] [plaintiff established ownership interest in action for partition and sale of real property by submitting copy of deed conveying interest to him]).

Although neither party offers dispositive evidence as to whether a partnership exists, or whether the property is owned by the partnership, neither possibility is foreclosed, as the evidence offered by defendants raises a triable issue of fact as to whether the parties hold title as partners (*see Wiener v Spahn*, 110 AD3d 443, 444 [1<sup>st</sup> Dept 2013] [circumstantial trial evidence showed that partnership was true owner of property, even though deeds reflected title held by individual partners as tenants in common]; *Bianchi v Midtown Reporting Serv., Inc.*, 103 AD3d 1261, 1261–62 [4<sup>th</sup> Dept 2013] [summary judgment denied in action for breach of partnership agreement and accounting, even absent express partnership agreement, where circumstantial evidence as to manner of control and management, among other things, created issue of fact as to whether partnership existed]; *Benham*, 50 AD2d at 809 [in partition action, plaintiff's claim that deed to premises proved conclusively that property was held as tenancy in common unavailing,

as defendants offered circumstantial evidence that property owned by partnership]; *cf. Carr v Caputo*, 114 AD3d 62, 72 [1<sup>st</sup> Dept 2013], *lv dismissed* 23 NY3d 996 [2014] [in action to determine ownership of property where title held in name of individual partners, plaintiff could not establish, absent documentation or other evidence, that partners intended property to be owned by partnership, or formed partnership for purposes of holding title]). In any event, even if the parties are tenants in common, their respective rights must be determined before a judgment of partition and sale may be made, and their disagreement as to the same precludes summary judgment. (*See Goldberger v Rudnicki*, 94 AD3d 1048, 1050 [2d Dept 2012] [order granting summary judgment for judicial sale of real property reversed, as parties disagreed about respective rights and share in property, and determination as to those rights was prerequisite to sale]).

As it is unopposed, plaintiffs' claim for an accounting is granted.

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is denied to the extent they seek the partition and sale of the property located at 122 West 13<sup>th</sup> Street, New York, New York, and otherwise granted; it is further

ORDERED, the court having on its own motion determined to consider the appointment of a referee to determine as follows, and it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR 4317(b) in that an examination of a long account will be required, that a Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the Special Referee for such purpose:

the issue of an accounting of each parties' interest in the property located at 122 West 13<sup>th</sup> Street and the value of that property from January 2014 to the present; it is further

ORDERED, that the power of the Special Referee shall not be limited beyond the limitations set forth in the CPLR; it is further

ORDERED, that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (SRP), which, in accordance with the Rules of the Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED, that plaintiffs shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendants shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referee Part,

subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that part; it is further

ORDERED, that except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specific above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; it is further

ORDERED, that counsel shall file memoranda or other documents directed to the assigned Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED, that the parties shall appear for a status conference on September 5, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

7/3/2018

DATE

BARBARA JAFFE J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: