SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

LYNTONIA COSTON,

Plaintiff,

- against -

INDEX NO. 507801/2014
Seq. No. 4, 5

LAWANDA GREENE, HSBC BANK USA, N.A., as Trustee for Fremont Home Loan Trust 2006-E, Mortgage-Backed Certificates, Series 2006-E, JOHN DOE CORPORATION, and/or JOHN DOE,

Defendants.

The following e-filed papers read herein:

Notice of Amended Motion/Cross Motion, Supporting Affirmations (Affidavits) and Exhibits	60-75, 78-85
Affirmations (Affidavits) in Reply and in Opposition	86
Transcript of Oral Argument	Unnumbered

Motions sequence numbers 4 and 5 are consolidated for disposition.

This is an action for the partition and accounting of a residential real property. Before the Court is an amended motion in sequence number 4 by plaintiff Lyntonia Coston (plaintiff or Coston) for an Order (1) pursuant to CPLR 3212, granting her summary judgment and directing that a referee be appointed to conduct a partition sale and to thereafter hold a hearing to ascertain the respective shares of the parties having an interest in the subject property sought to be partitioned and to ascertain the remaining amount due to plaintiff and defendant Lawanda Greene (Greene) in accordance with their respective shares in the subject property; and (2) directing that a referee conducts an accounting of any and all proceeds that have been received by Greene from rental payments on the subject property, including the review of the carrying

costs and taking into consideration Greene's fair use and occupancy of her apartment at the subject property.[1]

In opposition to plaintiff's amended motion, Greene cross-moves in sequence number 5 for an Order (1) dismissing plaintiff's motion for summary judgment; (2) dismissing this action, pursuant to CPLR 3211(a)(7), for failure to state a cause of action; or, in the alternative, (3) directing an accounting, and (4) granting her contribution from plaintiff.

Defendant HSBC Bank USA, N.A., as trustee for the Fremont Home Loan Trust 2006-E, Mortgage-Backed Certificates, Series 2006-E (HSBC), filed no response to the instant motion and cross-motion. HSBC's counsel stated at oral argument (Transcript pg. 5, lines 10-11) that HSBC takes no position on the instant motion and cross-motion.

BACKGROUND

Plaintiff Coston and defendant Greene were domestic partners, and they purchased a house at 835 Jefferson Avenue in Brooklyn (the subject property), as joint tenants, on September 28, 2006. The house consists of two separate apartments and a basement apartment. Plaintiff and Greene lived in one of the apartments, and rented out the other apartment and the basement to tenants. The parties' relationship subsequently deteriorated, and plaintiff moved out of the subject property in 2010. Plaintiff thereafter commenced this action in August 2014 to sell the subject property and divide the proceeds between herself and defendant. A second Amended Complaint was filed on May 31, 2015, which asserts causes of action for the partition of the subject property and ½ (one-half) interest in the equity, as well as a full accounting and appraisal of the subject property so as to ascertain the true value of plaintiff's interest in the subject property. It is plaintiff's contention that since she has moved out

[1] The Court notes that in ¶ 20 of her counsel's affirmation in support, plaintiff requests to discontinue this action as against defendants John Doe Corporation and/or John Doe. However, pursuant to this Court's Part Rules, if there is a discrepancy between the relief sought in a Notice of Motion and the relief sought in the supporting motion papers, *the Notice of Motion is controlling.*" Accordingly, the Court shall not consider this requested relief.

of the property, she has not been privy to the accounts on the subject property and has thus been prevented from sharing in any profits realized as a result of the rental payments from the other units. Greene submitted an Amended Answer on June 20, 2015. A preliminary conference was held on August 1, 2015, but all compliance conferences subsequent thereto have been adjourned, and the Note of Issue has not been filed.

Plaintiff contends that neither of the defendants' answers raise any issue of facts, which prevent the granting of summary judgment. Plaintiff notes that while Greene alleges that there was a prior agreement for Greene to buy out the plaintiff's interest which was never consummated, plaintiff denies same, and would request an accounting of the income and expenses related to the subject property prior to any consent to be bought out of the property. Moreover, plaintiff notes that no discovery is required or necessary as the ownership of the property is fully documented in the attached deeds. Moreover, plaintiff believes that the nature of the property is so circumstanced that an actual partition would not be possible without great prejudice to the owners such that a sale is probably necessary.

In opposition and in support of her cross-motion, Greene contends that there are material issues of fact herein which would preclude this Court from granting summary judgment in plaintiff's favor. Greene believes that this partition action should be dismissed because plaintiff agreed to accept payment in lieu of a partition action. Specifically, Greene notes that the parties had an agreement that plaintiff would accept $74,000 in exchange for any interest or title in the subject property, thus waiving plaintiff's right to partition. Greene maintains that plaintiff is on the deed merely for convenience, as she only paid incidental expenses occasionally and only when she resided at the property. Greene argues that should this Court find that plaintiff is entitled to a partition of the property, Greene should receive contribution from the plaintiff for all expenses associated with the premises that plaintiff has neglected since its purchase in 2006. It is Greene's belief that plaintiff is seeking to be unjustly enriched with

half the value of the premises which according to Greene she stated on numerous occasions she did not want and abandoned. Greene asserts that she relied upon the parties' agreement of settlement and remained in the home and took complete financial responsibility for same. Thus, Greene asserts, should this matter not be dismissed, Greene must be afforded a full accounting and contribution from plaintiff for all monies spent before and after plaintiff vacated the premises. Greene believes that discovery is necessary herein and that the appointment of a referee is not required.

STANDARDS

A. Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]).

The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; CPLR 3212[b]).

B. Motion to Dismiss

CPLR 3211(a) states:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . .
>
> (7) the pleading fails to state a cause of action. . . ."

When determining a CPLR 3211(a) motion, the court "liberally construe[s] the complaint and accept[s] as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144,151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

A dismissal of motion under CPLR 3211(a)(7) requires determining whether the plaintiff has *stated* a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading *has* a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*Sokol*, 74 AD3d at 1182, quoting *Guggenheimer*, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a dismissal motion on the basis of failing to state a cause of action generally must accept the facts alleged in the

complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181), even when such allegations are "upon information and belief" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [2d Dept 1989]). However, legal conclusions and factual claims flatly contradicted by the evidence will not be presumed true (*Sweeney v Sweeney*, 71 AD3d 989, 991 [2d Dept 2010]; *Parsippany Constr. Co., Inc. v Clark Patterson Assoc., P.C.*, 41 AD3d 805, 806 [2d Dept 2007]).

C. Statute of Frauds

Additionally, the statute of frauds prohibits the conveyance of real property without a written contract (*see* General Obligations Law § 5–703[1]; *Kurlandski v Kim*, 111 AD3d 676, 676 [2d Dept 2013]). "To satisfy the statute of frauds, a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement" (*Piller v Marsam Realty 13th Ave., LLC*, 136 AD3d 773, 773-774 [2d Dept 2016]). However, courts of equity do, have the power to "compel the specific performance of agreements in cases of part performance" (General Obligations Law § 5–703(4); *Kurlandski* , 111 AD3d at 676, citing *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 N.Y.2d 229, 235 [1999]). A party's partial performance of an alleged oral contract will be deemed sufficient to take such contract out of the statute of frauds only if it can be demonstrated that the acts constituting partial performance are unequivocally referable to said contract (*id.*). "Unequivocally referable conduct is conduct that "is inconsistent with any other explanation" (*id.*, quoting *Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003]; *see also Barretti v Detore*, 95 AD3d 803 [2d Dept 2012]).

D. Partition

"A joint tenancy . . . is an estate held by two or more persons jointly who have equal rights to share in its enjoyment during their lives, and where each joint tenant has a right of

survivorship" (*Trotta v Ollivier*, 91 AD3d 8, 12 [2d Dept 2011]). "Under New York law, joint tenancies may be severed by the court-ordered partition of the property that adjusts the rights of the parties and permits its sale if it appears that a partition cannot be made without great prejudice to the owners (*see* Real Property Actions and Proceedings Law [RPAPL] 901[1])" (*id.*).

The right to partition is not absolute, however, and while a joint tenant has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties (*see Tsoukas v Tsoukas*, 107 AD3d 879 [2d Dept 2013]). As is relevant herein, RPAPL 1201 provides that "[a] joint tenant . . . may maintain an action to recover his [or her] just proportion against his [or her] co-tenant who has received more than his [or her] own just proportion. . . ." (RPAPL 1201). "[T]he statutory purpose of RPAPL 1201 is the codification of the long-established principle that a tenant be required to account to co-tenants for rents received from third parties" (*Trotta*, 91 AD3d at 14). Thus, 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 [4th Dept 1983]). These include acquisition payments, such as closing costs and mortgage payments (*see Quattrone v Quattrone*, 210 AD2d 306, 307 [2d Dept 1994]; *see also Brady v Varrone*, 65 AD3d 600, 602 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property (*see Vlcek v Vlcek*, 42 AD2d 308, 311 [3d Dept 1973]). 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 [2d Dept 2009]; *Misk v Moss*, 41 AD3d 672, 673 [2d Dept 2007], *lv dismissed* 9 NY3d 946 [2007], *lv denied* 10 NY3d 704 [2008]).

E. Accounting

An accounting is a "necessary incident of almost every partition action, and is as a matter of right before the entry of either the interlocutory or final judgment" (*Giglio v Giglio*, 46

AD2d 921, 921 [2d Dept 1974] [internal quotation marks omitted]). "[T]he court [may] compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale" (*Oliva v Oliva*, 136 AD2d 611, 612 [2d Dept 1988]). The court may also adjust the rights of the parties where one party obtains more than his or her proper share of rents or profits derived from the property, or spends more than his or her proper share for expenses to protect or preserve the property (*see Freigang v Freigang*, 256 AD2d 539, 540 [2d Dept 1998]; *Wawrzusin v Wawrzusin*, 212 AD2d 779, 779-780 [2d Dept 1995]).

DISCUSSION

The record includes a copy of an undated text message from defendant to plaintiff (the text message), which reads in its entirety, as follows:

> "Hey,
>
> I have accepted your offer for 70K to buy you out [of] the house... Okay lol, 74K..... I don't know how I am going to pay it out... I have not had time to set [sic] on phone with TRS... But I wanted to let you know I have accepted... Although, I believe 70 is better but im [sic] not going to fight with you :)
>
> Love
> L"

Defendant claims that the text message represents a binding agreement by which plaintiff agreed to sell to defendant her interest in the subject property for $74,000. Plaintiff, in opposition, contends that this alleged agreement is unenforceable under the Statute of Frauds (General Obligations Law § 5-703[2]).

At the outset, the Court rejects defendant's contention that the text message constituted a binding contract by which plaintiff agreed to sell her interest in the subject property to defendant. The text message, as quoted above, does not satisfy the Statute of Frauds. At a minimum, the text message fails to describe the subject property with the degree of certainty necessary to satisfy the Statute of Frauds (*see* General Obligations Law § 5-703 [2]; *Cohen v*

Swenson, 140 AD2d 407 [2d Dept 1988]). The text message refers only to "the house" and makes no reference to real property or land. Moreover, no property street address is stated in the text message, nor does it set forth dimensions, acreage, metes and bounds, or lot number (*see Sieger v Prehay*, 16 AD3d 575 [2d Dept 2005]). Accordingly, the branch of Greene's cross-motion to dismiss the Complaint for failure to state a cause of action is denied.

Turning to plaintiff's request for summary judgment, the Court finds that she has made a *prima facie* showing of entitlement to judgment as a matter of law by submitting a copy of the duly-executed Bargain and Sale Deed with Covenant, dated September 28, 2006, demonstrating her ownership in, and her right to possession of, the subject property as a joint tenant with defendant (*see Beshara v Beshara*, 51 AD3d 837, 839 [2d Dept 2008]). Plaintiff also has made a *prima facie* showing that the subject property is so circumstanced that a partition thereof cannot be made without great prejudice to its owners (*see Cadle Co. v Calcador*, 85 AD3d 700, 702 [2d Dept 2011]). In opposition, however, defendant has raised triable issues of fact as to whether the equities weigh in her favor. Considering that she "maintained full financial responsibility for the subject property with no assistance from Plaintiff" and became "the sole person financially responsible for the subject property" after plaintiff abandoned it in 2010 (*see* Defendant's Affidavit in Support of Cross Motion and in Opposition to Plaintiff's Motion for Summary Judgment, dated January 31, 2016, ¶¶ 11, 19); *see Tsoukas*, 107 AD3d at 880; *Arata v Behling*, 57 AD3d 925, 926 [2d Dept 2008]).

As for the accounting, the Court is concerned that this is a waste of judicial resources. Plaintiff continues to request an accounting from a Referee even after the Court offered to perform an accounting for the parties. Specifically, on May 2, 2017, the Court held a settlement conference, and thereafter, Ordered as follows:

The Parties (the Parties shall mean plaintiff and defendant Greene) are hereby Ordered to submit to the Court, on or before July 7, 2017, the following:

(1) itemize all expenses on the subject Property from September 2006 to present;

(2) itemize all income received on or from the subject Property from September 2006 to present;

(3) list time frames of all tenants that have occupied the Subject Property since September 2006 to present;

(4) provide copies of any and all rental agreements issued or used with regards to the Subject Property from September 2006 to present;

(5) provide copies of all legal payments "made in or will have to be made" in regards to the present case;

(6) itemize all mortgage payments made on the Subject Property from September 2006 to present;

(7) Bank will order an onsite appraisal on or before June 1, 2017, parties to split the costs 50/50;

(8) parties to itemize all expenses made with regards to upkeep of subject Premises from September 2006 to present.

The Court also Ordered that the parties exchange the settlement documents referenced above, and return for a continued settlement conference on July 18, 2017, at 11:00 a.m. On July 18, 2017, the Court presided over a settlement conference with all parties and their attorneys present, and attempted to perform an accounting for the parties, in advance of deciding the summary judgment motions. Plaintiff's Counsel, Mr. O'Keke, refused to participate in or follow the accounting procedures, for reasons unknown to the Court, and he now seeks an Order from this Court allocating further judicial resources to perform a function which the Court itself attempted to resolve. On January 29, 2018, the parties participated in a telephone conference with the Court regarding the accounting issue. During that conference Mr. O'Keke

advised the Court that he and his client wanted the Court to decide the issue based on the motion papers submitted.

While the Court finds that plaintiff is not entitled to a second accounting review, nonetheless, the Court, in equity, grants defendant another accounting which the Court finds is critical to apportionment of any fees and costs incurred by the parties. Therefore, the branch of defendant's cross-motion for an accounting is granted.

CONCLUSION

Based upon the foregoing and after oral argument, it is hereby,

ORDERED that plaintiff Lyntonia Coston's motion (motion sequence 4) is denied; and it is further,

ORDERED that defendant Greene's cross-motion (motion sequence 5) is denied, except as to the portion of the cross-motion seeking an accounting, which is also granted to the extent that a Referee shall be appointed in the Order to be settled hereon; and it is further,

ORDERED that the parties are directed to SETTLE ORDER appointing a Referee; and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 8/28/18

PAUL WOOTEN, J.S.C.

2018 SEP 19 AM 9:19
FILED