

**Xiao Ling Yang v 174 Elizabeth St. LLC.**

2018 NY Slip Op 32822(U)

November 2, 2018

Supreme Court, New York County

Docket Number: 150801/2018

Judge: William Franc Perry

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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: HON. W. FRANC PERRY

PART

IAS MOTION 23EFM

*Justice*

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INDEX NO. 150801/2018

XIAO LING YANG, as Trustee under  
SIMON CHOON REVOCABLE TRUST  
Dated November 10, 2008,

MOTION DATE N/AMOTION SEQ. NO. 002

Plaintiff,

- v -

174 ELIZABETH STREET LLC.  
GEORGE LEE, and THOMAS LEE.

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff Xiao Ling Yang ("Plaintiff"), who was married to the late Simon Choon ("Decedent"), is the purported executrix of the Estate of Simon Choon (the "Estate") and trustee of the Simon Choon Revocable Trust (the "Trust"). Plaintiff alleges that the Trust is the present owner of a 25% interest, as tenant-in-common, in the property located at 174 Elizabeth Street, New York, New York (the "Property"). On January 26, 2018, Plaintiff commenced this action by filing a Summons and Complaint (the "Complaint") and an Order To Show Cause seeking, *inter alia*, appointing a referee and directing the partition and sale of the Property due to the failure of the defendants George Lee and Thomas Lee (together, the "Lees"), and the entity to which they sold their seventy-five percent (75%) interest in the Property, 174 Elizabeth Street, LLC ("174 Elizabeth Street") (collectively, "Defendants"), to account to Plaintiff and/or otherwise permit Plaintiff to share in the proceeds of the Property.

Issue was joined on March 30, 2018, by Defendants' service of a verified answer with counterclaims (the "Answer"). The Answer asserts eight affirmative defenses and five

counterclaims. Thereafter, on May 15, 2018, Plaintiff served a Verified Reply to Counterclaims, which asserts fourteen affirmative defenses to Defendants' Counterclaims. Although certain documentary materials have been exchanged between the parties as attachments to pleadings and motions filed with the Court, there has been no formal discovery in this action.

Now, Plaintiff moves, pursuant to CPLR 3212 and RPAPL 901, for an order granting summary judgment in favor of Plaintiff and: (1) directing a partition and judicial sale of the Property; (2) declaring that the Property cannot be physically partitioned amongst its owners without great prejudice; (3) dismissing Defendants' counterclaims and affirmative defenses; and (4) appointing a referee. Defendants oppose Plaintiff's motion on the grounds that discovery has not commenced and there are issues of fact that preclude 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]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement 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]). Furthermore, "the court may deny a motion for summary if it appears that 'facts essential to justify opposition may exist but cannot then be stated'" (*First Bank of the Americas v. Motor Car Funding, Inc.*, 257 AD2d 287, 294 [1<sup>st</sup>

Dept 1999], quoting *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1<sup>st</sup> Dept 1996]).

Regarding Plaintiff's first cause of action for a partition, Section 901 of New York's Real Property Actions and Proceedings Law provides, in pertinent part, that;

"1. 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."

Here, Plaintiff fails to make a prima facie showing of her entitlement to a partition or judicial sale of the Property. First, Plaintiff submits no proof that the Decedent's 25% interest in the Property became part of the Estate upon Decedent's passing on February 19, 2014, and that Plaintiff, as Executrix of the Estate, was authorized to transfer Decedent's 25% interest as a tenant-in-common in the Property to the Trust on July 30, 2014 (NYSCEF 6). Moreover, the documents that Plaintiff submits to support the proposition that she is the current and duly appointed Trustee of the Trust are incomplete, redacted, and thus insufficient to demonstrate that there are no material issues of fact regarding Plaintiff's ownership interest in the Property and her entitlement to seek partition.

In order to succeed on his motion for summary judgment directing a sale of the Property, Plaintiff was further required to establish that a partition cannot be made "without great prejudice to the owners" (*Deschamps v Deschamps*, 26 Misc 3d 1221(A) [Sup Ct Queens Cnty 2010], citing RPAPL § 901[1]). Plaintiff fails to submit any evidence to support her contention that the Property, which is a four-story apartment building, with a basement, cannot be physically partitioned without great prejudice to the owners of the Property. Therefore, plaintiff has not met her burden for an order directing a sale of the subject property.

Regardless, the Settlement Agreement submitted by Defendants, which states that, upon Decedent's death, "management of the Property shall be assumed by T. Lee and G. Lee," raises a question of fact as to whether Plaintiff is entitled to seek partition of the Property (NYSCEF 52; *see also Chew v Sheldon*, 214 NY 344, 348-49 [1915] ["equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims"] [citations omitted]).

Given the Court's denial of Plaintiff's request for an order directing that the Property be partitioned or sold, Plaintiff's request for the appointment of a receiver to supervise the sale is denied as premature.

Plaintiff also moves to dismiss Defendants' affirmative defenses. Defendants assert eight affirmative defenses: (1) the complaint fails to state a cause of action; (2) the complaint fails to state a claim; (3) defendant is entitled to an offset; (4) Plaintiff's recovery is barred by the doctrine of laches; (5) plaintiff's recovery is barred by the doctrine of unclean hands; (6) the complaint should be dismissed on the grounds that Plaintiff holds no right, title, and/or interest in the Property; (7) plaintiff's recovery is barred by the doctrine of waiver; and (8) Plaintiff's claims in the Complaint related to certain alleged distributions are barred by the applicable statute of limitations.

Under CPLR 3211(a)(7) a court may dismiss a complaint for failure to state a cause of action. The court's role on this motion is to determine when a cause of action is stated within the four corners of the complaint (*Frank v. Daimler Chrysler Corp.*, 292 A.D. 2d 118 [1st Dept 2012]; *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y. 2d 409, 754 N.E. 2d 184 [2001] [a court must search the complaint for a cognizable legal theory]). Although on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference,

conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss (*Godfrey v. Spano*, 13 N.Y. 2d 358 [2009]).

Here, the Court finds that Plaintiff's Complaint does state within its four corners a cause of action. Accordingly, that part of the motion is granted and Defendants' first and second affirmative defenses are dismissed.

However, Plaintiff's motion to dismiss Defendants' third, fourth, fifth, sixth, seventh, and eight affirmative defenses is denied, as Plaintiff's papers fail to explain how those defenses are inapplicable to this partition action, and that discovery could not result in disclosure of evidence relevant to those affirmative defenses (*Cf. Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654 [2d Dept 2011]).

Likewise, Plaintiff's motion to dismiss Defendants' counterclaims is denied as premature. A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see Downey v Local 46 2nd Holding Co.*, 34 AD3d 318 [1st Dept 2006] [denying as premature plaintiff's summary judgment motion seeking dismissal of cross-claim for indemnification, where the motion was brought prior to the preliminary conference or the opportunity of the parties to conduct discovery]; *see also Venables v. Sagona*, 46 A.D.3d 672, 673 [2d Dept 2007]; *Amico v. Melville Volunteer Fire Co., Inc.*, 39 A.D.3d 784, 785, 832 N.Y.S.2d 813 [2d Dept 2007]).

Accordingly, it is hereby

ORDERED that the branch of Plaintiff's motion for summary judgment on the Complaint is denied; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing Defendants' affirmative defenses is granted in part and Defendants' first and second affirmative defenses are dismissed; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing Defendants' affirmative defenses is denied as to Defendants' third, fourth, fifth, sixth, seventh, and eighth affirmative defenses; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing Defendants' counterclaims is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 20, 2018, at 9:30 AM in room 307 at 80 Centre Street, New York, New York.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

11/02/2018  
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE