Supreme Court of the State of New York
County of Kings

Part 91

FREDERICKA RIORDAN,

Plaintiff,

against

FRANKLIN CIACCIO AND SUSAN CIACCIO (HUSBAND AND WIFE),

Defendants.

Index Number 517524/2016

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	
Exhibits.....	
Other	

Upon the foregoing papers, plaintiff's motion to reargue (Mot. Seq. 008) is decided as follows:

Factual Background

Plaintiff and defendants are upstairs/downstairs neighbors in a four-story residential building. In her motion to reargue, plaintiff contends that she and defendants are not "upstairs/downstairs neighbors", but she does not explain why this statement is incorrect. Plaintiff's counsel stated in his moving affirmation for the underlying motion that the building is four stories that includes two duplex apartments, and that defendants live in the upper two floors (Markman Affirmation at ¶¶ 5 and 12). Plaintiff's appraiser describes the property similarly (Domenick Neglia appraisal at 32). Thus, it appears that the apartments are situated one above the other. If plaintiff objects to the characterization that the parties are "neighbors" because, although plaintiff owns the unit, she does not live there, and has not lived there for a number of years, then the court accepts the clarification.

Plaintiffs are tenants in common, with each owning a one-half interest in the property. Plaintiff brought this action against defendants seeking a declaration of the parties' respective

ownership interests, judgment of partition and sale of the property and, from the proceeds of such sale, payment to the parties of monies they expended on the property pursuant to an accounting, payment of any mortgage, payment of the costs of sale, and disbursement of any remainder to the parties. Defendants counterclaim for physical partition and ask that the property be converted into a condominium or cooperative apartments. Defendants further ask the court to sell plaintiff's residence under court supervision and that the proceeds of this sale be used: (1) to bring plaintiff's residence into compliance with the New York City Building Code; and (2) to repay defendants for monies they have expended for the benefit of the entire building.

Procedural History

Defendants previously moved to compel discovery and for preclusion (Mot. Seq. 004). Plaintiff then moved for summary judgment (Mot. Seq. 005), and defendants cross-moved for summary judgment, or to dismiss, or to compel discovery, or to preclude, or to strike plaintiff's complaint (Mot. Seq. 006). Plaintiff objected to the court's consideration of defendants' cross-motion because it did not attach the pleadings. It was not required to do so. As a cross-motion, it was adjudicated simultaneously with plaintiff's motion for summary judgment, to which the pleadings were attached (*Long Is. Pine Barrens Socy., Inc. v County of Suffolk*, 122 AD3d 688, 691 [2d Dept 2014]).

By order, dated June 28, 2019, the court denied plaintiff's motion for summary judgment, which only sought judgment on plaintiff's claim for declaration of the parties' property interests, as well as partition and sale. The court also largely denied defendants' cross-motion to compel, and for summary judgment on its claims for physical partition and reimbursement of expenses. The court awarded summary judgment only on defendants' claim for reimbursement of property taxes.

Regarding the parties' claims for partition, the court found that neither party made a sufficient showing that warranted summary judgment in their favor. Plaintiff did not establish that she would suffer great prejudice should the property be physically partitioned because, most significantly, plaintiff did not establish the costs of physical partition. The court further noted that it was an open question, especially considering the limited evidentiary record, as to which form of prejudice outweighed the other. The plaintiff may be prejudiced by physical partition of the property because the value of the property could decrease, and the cost of physical partition could be significant. On the other hand, the defendants, two elderly retirees, could be prejudiced by being forced from their home of fifty years.

Additionally, in its order, this court awarded summary judgment on defendants' claims for reimbursement of property taxes only. Defendants affirmed that they paid these expenses which were owed by plaintiff, and plaintiff did not dispute defendants' claim. For defendants' remaining monetary claims, the court found that there was not sufficient evidence to show which amounts plaintiff owed and which amounts defendants owed. The court also did not award defendants summary judgment on their request for an order directing the sale of plaintiff's residence, as there was not sufficient evidence to render such an award.

The court also denied defendants' initial motion to compel discovery and to preclude, as well as their cross-motion for similar relief. The court found that defendants did not sufficiently identify what information they still required to prove their claims or defend against plaintiff's claims. Furthermore, the time for discovery in this matter had passed, as the case had already been on the trial calendar for a year.

Analysis

Plaintiff now moves to reargue their motion for summary judgment and, upon

reargument, seeks judgment declaring the parties' respective property interests, and seeks partition and sale of the entire building. For a motion to reargue, plaintiff must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998-1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966–67 [2d Dept 2016]).

First, plaintiff seeks clarification about their request for judgment declaring the respective property interests of the parties. As the court held in its prior order, the parties are tenants in common, with each owning a one-half interest in the property. However, to any extent that the prior order was not explicit, the court grants plaintiff's motion for reargument and, upon reargument, grants plaintiff's motion for summary judgment solely to the extent of declaring that the parties are tenants in common, with each owning a one-half interest in the property.

Next, plaintiff objects to the court's conclusion that there were triable issues of fact that prevented an award of summary judgment on plaintiff's partition claim. As an initial matter, the court was bound by controlling authority in the Second Department, which directs that "[t]he actual physical partition of property is the preferred method and is presumed appropriate unless one party demonstrates that actual physical partition would cause great prejudice, in which case the property must be sold at public auction" (*Perretta v Perretta*, 143 AD3d 878, 879 [2d Dept 2016], quoting *Lauriello v Gallotta,* 70 AD3d 1009, 1010 [2d Dept 2010]). Plaintiff contends that partition and sale is the "most common" form of partition relief. Even if this is true, and plaintiff cites no evidence that it is true, it is irrelevant. The law directs physical partition unless the objecting party – in this case, the plaintiff – proves "great prejudice".

Plaintiff next mistakenly argues that her showing of "great prejudice" is a purely a legal issue. The Second Department does not agree, and neither do I (*Perretta*, 143 AD3d at 879

[denying plaintiff's motion for summary judgment because there were issues of fact "as to whether physical partition or sale of the subject property is appropriate"]; *Snyder Fulton St., LLC v Fulton Interest, LLC*, 57 AD3d 511, 513 [2d Dept 2008] [holding that "[w]hether physical partition or sale is appropriate is a question of fact"]). Indeed, plaintiff herself submits factual assertions that she contends support a finding of prejudice.

In accordance with this and other Second Department authority, this court held that plaintiff failed to make her prima facie case that she would suffer "great prejudice" if the property is physically partitioned. Plaintiff devotes the majority of her motion to re-litigating her contention that physical partition will decrease the value of the property. However, this claim of prejudice is still incomplete, and requires proof of the costs of physical partition.

Rather than proving these costs, plaintiff now argues that the court should take judicial notice of the amount of such costs. This new argument, which plaintiff did not make in her underlying motion, is inappropriate in a motion to reargue (*Rodriguez*, 138 AD3d at 966–67). Additionally, plaintiff submits no legal support for her contention that the court should or even could take judicial notice of the amount of these costs.

Plaintiff also argues that it was somehow contradictory for this court to find that she needed to prove the costs of partition while also concluding that the parties were not entitled to additional discovery. Plaintiff again misconstrues this court's decision. This court did not hold that there was no need for further discovery, but only that defendants did not establish what additional discovery was needed.

Because plaintiff did not make her prima facie case regarding prejudice and, for that matter, neither did defendants, there remained triable issues of fact about whether plaintiff would suffer great prejudice if the property were physically partitioned. In closing this point, this court

found that the balance of the equities in this case remained an open question (*Tsoukas v Tsoukas*, 107 AD3d 879, 880 [2d Dept 2013] [holding that partition "is always subject to the equities between the parties]). On one hand, plaintiff might suffer prejudice by physical partition if the property value decreases too much and the cost is too great. On the other hand, defendants, who are elderly, might suffer prejudice by being forced to relocate from their home of fifty years. Plaintiff argues that the court does not recognize this prejudice, but such an argument is belied by the clear policy of preferring physical partition, which allows people to remain in their homes.

Next, plaintiff argues that the court should not have ruled on defendants' request for reimbursement of expenses because: (1) defendants did not seek reimbursement of expenses; and (2) the request should have been referred to a referee for a separate hearing. As to this first point, plaintiff is mistaken. In their counterclaims, defendants specifically request reimbursement of expenses that they alleged they paid on plaintiff's behalf, such as real estate taxes, and repairs made to the sidewalk, fence and gate, slate walkway, steps, brickwork, heating system, and the roof (Counterclaims at ¶¶ 1 and 2, and Wherefore Clause at ¶ iv). Furthermore, defendants' cross-motion for summary judgment sought, "[p]ursuant to N.Y. R.P.A.P.L §901 and N.Y.C.P.L.R. §3212, granting summary judgment to the Ciaccios ***and*** ordering a physical partitioning of the property" (Notice of Cross-Motion at ¶ A. emphasis added). The request for summary judgment included all of defendants' counterclaims. To that end, defendants spent several pages of their cross-motion and submitted numerous exhibits concerning the money they claim to have spent on plaintiff's behalf.

As to plaintiff's second point, there is no law preventing this court from awarding defendants summary judgment on their claim for reimbursement of expenses. To be clear, plaintiff is correct that an accounting is a necessary part of any action for partition (*Khotylev v*

Spektor, 165 AD3d 1088, 1090 [2d Dept 2018]). However, neither the court in *Khotylev*, nor RPAPL 981, hold that a court cannot perform some or all of the accounting, or that certain costs cannot be awarded on summary judgment. Further, the court never held or otherwise gave any indication that there would be no hearing for an accounting. Indeed, the court held that defendants did not prove many of their expenses, which will require a hearing at or before the time of trial.

Lastly, plaintiff argues that the court should not have awarded defendants the full amount of property tax that they paid. Plaintiff contends that, because the parties are tenants in common, each with a one-half interest in the property, plaintiff's portion of the tax debt was only one-half of the amount owed. In their underlying cross-motion for summary judgment, defendants submitted an affidavit from Franklin Ciacco. In his affidavit, Mr. Ciacco described common expenses of which plaintiff failed to pay her share. These expenses included fees and/or taxes from the New York City Department of Finance and the New York City Water Board, as well as property taxes (Ciacco Affidavit at ¶¶ 30, 41-48). Plaintiff had the opportunity to argue that it was premature to award costs, or to contest the expenses on their merit, and this court would have considered those arguments. However, plaintiff failed to make any argument whatsoever in opposition. Plaintiff cannot now, on reargument, submit new arguments objecting to defendants' earlier factual assertions (*Rodriguez*, 138 AD3d at 966–67).

For the reasons stated above, plaintiff's motion to reargue is granted solely to the extent that the court clarifies its prior award to plaintiff of summary judgment declaring that the parties are tenants in common, each owning a one-half interest in the property. This court further clarifies that its determination that plaintiff must repay defendants the property tax paid on plaintiff's behalf was a finding of fact, and not a money judgment which is immediately due and

payable. The court or a referee will hold a hearing to determine the remaining total amounts each side owes to the other, and will include this court's finding of fact as to the property taxes. To the extent there is any sale of the property, the proceeds of that sale shall be adjusted to reflect the final determination as to these expenses. If there is no sale, then the court will award a money judgment in favor of the party or parties who are owed money. The remainder of plaintiff's motion is denied.

This matter is remanded to NJTRP for a trial date to be determined.

This constitutes the decision and order of the court.

May 28, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court