

<b>Manieri v Manieri</b>
2021 NY Slip Op 32702(U)
December 17, 2021
Supreme Court, Kings County
Docket Number: Index No. 502302/2020
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

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ANNUNZIATA MANIERI,

Index No.: 502302/2020  
Motion Date: 12/15/2021  
Motion Seq.: 01, 02

Plaintiff,

– against –

**DECISION AND ORDER**

MARIO MANIERI, PAULA MANIERI-PIGNATARO,  
ANGELA LATTARULI, and 6806 13 AVENUE LLC,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions for summary judgment and to amend the answer.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 10-16 and (Motion 02) 24-40 were read on these motions for summary judgment and to amend the answer.

In this action for partition of real property, the plaintiff, Annunziata Manieri, moves (Motion 01) for an Order: 1) granting plaintiff summary judgment on the cause of action for partition of real property located at 6806 13th Avenue, Brooklyn, NY 11219 (the Property); 2) declaring that plaintiff is seized in an undivided one-fourth interest in the Property as a tenant in common and defendant 6806 13 Avenue LLC is seized in an undivided three-fourths interest in the Property as a tenant in common; 3) declaring that partition of the Property cannot be made without great prejudice to the owners thereof; 4) appointing a referee to conduct an accounting and to hear and report the costs and expenses chargeable against each parties' interest in the Property. Defendants Mario Manieri and Angela Lattaruli cross move (Motion 02) for an Order pursuant to CPLR § 3025(b), granting Mario Manieri and Angela Lattaruli leave to serve an Amended Answer with Affirmative Defenses and Counterclaims. After oral argument and a consideration of the parties' submissions, Motion 01 and Motion 02 are granted.

In support of its motion, the plaintiff submits the pleadings, the affidavit of the plaintiff, and copies of deeds to the Property. The plaintiff states in her affidavit that her parents, by deed dated February 27, 2001, transferred the Property to defendants Mario Manieri, Paula Manieri-Pignataro, and Angela Lattaruli, and the plaintiff as tenants in common, granting each a one-fourth interest in the Property. The plaintiff alleges that Mr. Manieri threatened her in 2017 and refused to allow her to reside at the Property. Plaintiff further states upon information and belief that defendants Manieri, Manieri-Pignataro, and Lattaruli transferred their interests to defendant 6806 13 Avenue LLC on or about June 29, 2018, and that a partition is necessary because she has been physically excluded from the Property.

In opposition to the motion and in support of its cross motion, defendants Mario Manieri and Angela Lattaruli submit, inter alia, their affidavits, a copy of the appraisal of the Property, and profit and loss statements and a rent roll. The defendants argue that the plaintiff's motion for summary judgment should be denied because there are issues of fact, and because the balance of

the equities favors the defendants. Defendants further argue that partition is unnecessary because they are willing to buy the plaintiff out of her one-fourth interest. Mr. Manieri states in his affidavit that this matter is only about money and that the plaintiff has no desire to return to the Property. Mr. Manieri and Ms. Lattaruli also state that the plaintiff was not excluded from the Property, but rather that she moved to a new, larger apartment that would accommodate her and her nine animals, and that the plaintiff would be free to move back into her apartment at the Property if she desired to do so.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman* at 562.

“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.” RPAPL § 901; *see Graffeo v Paciello*, 46 AD3d 613 (2d Dept 2007). However, the right to partition is not absolute, and subject to the equities between the parties. *See* RPAPL § 901; *see also Ripp v Ripp*, 38 AD2d 65 (2d Dept 1971); *Guo v Guo*, 137 AD3d 974 (2d Dept 2016); *Arata v Behling*, 57 AD3d 925 (2d Dept 2008). A tenant in common has the right to maintain an action for partition but the Court has an obligation to balance the equities of the co-tenants and a “great variety of circumstances.” *Ripp*, at 68; *see also Tsoukas v Tsoukas*, 107 AD3d 879 (2d Dept 2013).

Here, the plaintiff has established its prima facie entitlement to summary judgment as a matter of law. There is no dispute that the plaintiff holds a one-fourth interest in the Property pursuant to the deed dated February 27, 2001. *See* NYSCEF Doc. No. 35. The plaintiff’s parents, Domencio and Carmela Manieri, conveyed ownership of the Property to their four children in equal percentages, three of whom later conveyed their interests to 6806 13 Avenue LLC by deed dated June 29, 2018. *See* NYSCEF Doc. No. 36. The plaintiff is a tenant in common that can maintain an action for the partition of the Property, and actual partition of the premises cannot be accomplished without great prejudice to the plaintiff.

In opposition, Mr. Manieri and Ms. Lattaruli have failed to raise a triable issue of fact and have not demonstrated that the appointment of a referee for partition and sale of the Property should not be ordered by the Court. Here, the mere fact that some of the defendants still reside at the Property “does not tip the equities in [their] favor” and is insufficient to raise a material triable issue of fact. *See Rosenfeld v Langer*, 2016 WL 2988990, 2016 NY Slip Op 30950(U),

\*5 (Sup Ct, Kings County 2016). Accordingly, the plaintiff's summary judgment motion seeking a partition and sale of the Property is granted.

Furthermore, pursuant to CPLR § 3025(b), "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court." Motions for leave to amend pleadings should be freely granted in the absence of prejudice or surprise to the opposing party unless the proposed amendment is "palpably insufficient or patently devoid of merit." *Wells Fargo Bank, N.A. v Confino*, 175 AD3d 536, 537 (2d Dept 2019); see also *Lucido v Mancuso*, 49 AD3d 220 (2d Dept 2008). The legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. *Id.*; see also *Sample v Levada*, 8 AD3d 465, 467-468 (2d Dept 2004).

Here, the defendants have established an entitlement to serve an Amended Answer, as the plaintiff has failed to show that the proposed amendments are insufficient or otherwise devoid of merit. *Wells Fargo Bank* at 537. The plaintiff's argument that the counterclaims are barred by the statute of limitations and statute of frauds is unavailing, and the plaintiff has otherwise failed to show that these amendments would cause surprise or prejudice. As such, the defendants' cross motion is granted.

The remaining causes of action are without merit.

Accordingly, it is hereby

**ORDERED AND ADJUDGED**, that the plaintiff's motion for summary judgment seeking partition and sale of the Property located at 6806 13th Avenue, Brooklyn, NY 11219 (Motion 01) is GRANTED; and it is further

**ORDERED AND ADJUDGED**, that the plaintiff has demonstrated that the Property cannot be physically partitioned without great prejudice to the owners; and it is further

**ORDERED AND ADJUDGED**, that the plaintiff owns a one-fourth interest and defendant 6806 13 Avenue LLC owns a three-fourths interest in the subject premises as tenants in common; and it is further

**ORDERED AND ADJUDGED**, that a Special Referee is hereby appointed to hear and report or, if the parties consent, hear and determine all issues pertaining to an accounting as to expenses incurred by the parties, including real property taxes, utility bills and mortgage payments, liens and/or encumbrances, and the parties' relative share of the cost and expenses necessary for the maintenance and operation of the Property; and it is further

**ORDERED AND ADJUDGED**, that an Interlocutory Judgment of Partition and Sale will be issued subsequent to the submission of the Special Referee's hearing and determination concerning the accounting; and it is further

**ORDERED AND ADJUDGED**, that the motion by defendants Mario Manieri and Angela Lattaruli seeking leave to serve an Amended Answer with Affirmative Defenses and Counterclaims pursuant to CPLR § 3025(b) (Motion 02) is GRANTED.

This constitutes the decision and order of the Court.

DATED: December 17, 2021

*Lillian Wan*

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HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.