

Chung v Braithwaite
2022 NY Slip Op 33240(U)
September 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 3016/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of September 2022

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
HULBERT CHUNG and GLYNISS CHUNG,
Plaintiffs,

Index No.: 3016/2017

- against -

DECISION AND ORDER

CONSTANCE BRAITHWAITE, LANCELOT CHASE,
PATRICIA GORDON, RONALD GORDON,
LOLITA WILLIAMS, GORDON WILLIAMS,
JOHN DOE and JANE DOE,
Defendants.

Motion Sequence #3

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed 2-12,
Opposing Affidavits (Affirmations)..... 40, 47-59,
Reply Affidavits (Affirmations) 28-32,

After a review of the papers and oral argument the Court finds as follows:

The instant action was commenced by the Plaintiffs Hulbert Chung and Glyniss Chung (hereinafter “the Plaintiffs”) seeking the partition and sale of the premises known as 3709 Avenue M, Brooklyn, NY (the “Premises”). The Plaintiffs allege that they acquired title to the Premises in 1997 and are currently (according to Defendants) tenants in common with the Defendants Lancelot Chase, Gordon Williams and Lolita Williams.¹

¹ Motion sequence #4 was brought by Defendants’ prior counsel who was disqualified pursuant to a prior Decision and Order dated January 31, 2020. The motion sought to renew/reargue that Decision and Order. However, motion sequence #4 was brought as a cross-motion and prior counsel, notwithstanding his disqualification, included an affirmation both in support of motion sequence #4 and in opposition to motion sequence #3. Motion sequence #4 was denied pursuant to an Order dated February 10, 2022. To the extent that the attorney affirmation related to opposition to motion sequence #3, the Court determined that to be a nullity as a consequence of the prior

The Plaintiffs now move for an Order pursuant to CPLR 3212 providing for the following: a) partition of the Premises, b) publicly listing the Premises for sale, c) Plaintiffs to receive one-third of the net proceeds from sale, d) dismissal of Defendant's answer and counterclaims, and, alternatively, e) that the remaining proceeds be held (in escrow) pending a full accounting.

The Defendants oppose the motion and argue that it should be denied. The Defendants contend that the Plaintiffs have failed to meet their *prima facie* burden. Specifically, the Defendants contend that even assuming, *arguendo*, that the Plaintiffs could establish their alleged ownership interest in the Premises, the Plaintiffs cannot demonstrate that they purchased more than a 20 percent interest. Also, the Defendants contend that the motion is premature as depositions have not been conducted.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

RPAPL § 901 provides in pertinent part that “[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.” “The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is

disqualification. However, the parties were afforded an opportunity to further brief the issue, with new counsel appearing for the Defendants.

always subject to the equities between the parties.” *Arata v. Behling*, 57 AD3d 925, 926, 870 N.Y.S.2d 450, 450 [2d Dept 2008].

Motions for summary judgement have been denied as premature when a party opposing summary judgment is entitled to further discovery and “when it appears that facts supporting the position of the opposing party exist but cannot be stated.” *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 AD3d 738, 739, 903 N.Y.S.2d 80, 81 [2d Dept 2010]; see *Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 AD3d 578, 872 N.Y.S.2d 724 [2d Dept 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637, 815 N.Y.S.2d 183 [2d Dept 2006]. Moreover, ““where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.”” *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2d Dept 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 AD2d 792, 792–793, 533 N.Y.S.2d 143 [2d Dept 1988].

Both the Defendants and the Plaintiffs have raised issues regarding their respective ownership interests in and to the Premises, including a history of transactions and transfers between the parties. The Defendants do not agree that the Plaintiffs have the interest the Plaintiffs have alleged. The actual percentage could impact the equities between the parties. See *Goldberger v. Rudnicki*, 94 AD3d 1048, 1050, 943 N.Y.S.2d 176, 178 [2d Dept 2012]. Moreover, the Plaintiff concedes that there are issues of fact relating to an accounting. An interlocutory judgment for sale of the Premises is, in any event, inappropriate before an accounting is performed. See *Donlon v. Diamico*, 33 AD3d 841, 842, 823 N.Y.S.2d 483, 484 [2d Dept 2006]. Additionally, the Plaintiffs have failed to show that a sale could occur without great prejudice to the Defendants. See *Perretta v. Perretta*, 143 AD3d 878, 879, 39 N.Y.S.3d 495, 497 [2d Dept 2016]. Plaintiffs have recently sought an extension of the note of issue date and an Order

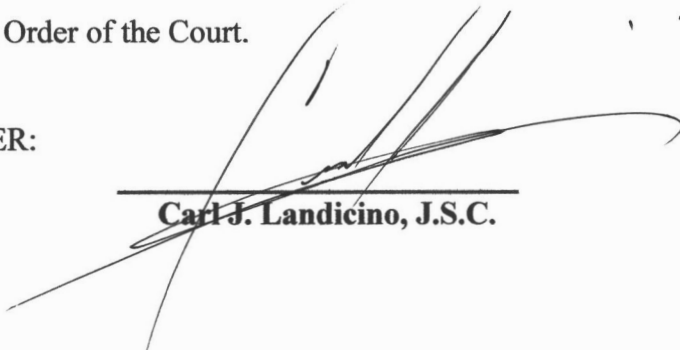
was issued on June 15, 2022 (Hon. Lawrence Knipel, J.S.C.) that granted Plaintiff's application and provided that depositions were to be held by July 30, 2022. Accordingly, the motion for summary judgment is denied as premature.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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