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| Xing Ng v Ng |
| 2021 NY Slip Op 31289(U) |
| April 15, 2021 |
| Supreme Court, Kings County |
| Docket Number: 511137/2020 |
| Judge: Lillian Wan |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

-----X
XING NG AND TASHA NG,

Plaintiffs,

-against-

SUE NG,

Defendant.
-----X

Index No. 511137/2020
Motion date: 4/14/21
Motion seq.: 02 & 03

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 02) 65-94, 119-129 and (Motion 03) 97-116, were read on these motions seeking summary judgment and dismissal.

This action involves a dispute between co-owners of a two-story brownstone located in the County of Kings, City and State of New York. The premises has four levels, to wit: a basement, first, second and third floors. According to the deed, the property was purchased in 2008, and the plaintiffs received a one-third undivided interest and the defendant received a two-thirds undivided interest. Immediately upon purchase the parties constructed a physical partition of the premises consisting of a locked partition door separating the third floor, where the plaintiffs reside, from the first and second floors, where the defendant resides with her son. Each party retained a key to the door to allow the plaintiff's access to the commons areas, including the backyard, backroom, a storage closet and the basement. The parties do not dispute their respective ownership interest in the property.

The plaintiff is seeking, inter alia, summary judgment on the plaintiffs' first cause of action for partition, declaring the rights, shares and interests of the parties in the premises as set forth in the deed; directing that a Referee be appointed and the premises be sold at public auction, and that the plaintiffs or any of the parties to this action may purchase the premises at the sale; directing that after paying the mortgage holder and all other amounts necessary to clear title the funds be placed into an escrow account until final judgment is entered in this action; and directing each party, on demand of the purchaser, to deliver to the purchaser all title, deeds and/or writings under the control of that party, and all other title deeds or writings to be deposited with the Kings County Clerk.

The plaintiff also seeks dismissal of the defendant's first counterclaim which seeks a declaratory judgment giving the defendant sole and exclusive use and enjoyment of the first and second floors, basement, backyard, backroom and storage area, and that the plaintiffs have no legal right to partition.

The defendant opposes the plaintiffs' motion, and cross moves seeking summary judgment, pursuant to CPLR 3212(b), on her second and third counterclaims for damages based on the plaintiffs' failure to pay expenses and their portion of the mortgage; and summary judgment on the defendant's fourth counterclaim seeking an accounting of the amount of the plaintiffs' outstanding share of the cost and expense of the upkeep of the property, utilities, mortgages, liens or encumbrances, and any other expenses necessary to maintain the property.

The defendant argues that a partition for sale is not required, and contends that the premises are already physically partitioned, and that it would cost approximately \$36,000 to completely partition the property to provide the plaintiffs with access to the basement, backyard, backroom, and staircase storage from the plaintiffs' third floor space. She claims that officially partitioning the premises into separate apartments would neither harm nor prejudice either party. The defendant submits as an exhibit an estimate of the cost of a physical partition from a construction company that is neither certified nor sworn. Defendant contends that the equities do not favor partition, and that the plaintiffs have not established that a physical partition of the premises cannot be obtained without great prejudice to the owners. The defendant argues that the parties have a binding agreement for partitioned use and occupancy of the premises based on the separation of the parties' living areas by a locked door between the defendant's residence on the first and second floors, from the third floor, where the plaintiffs reside, which was done shortly after the premises was purchased. According to the defendant, this oral agreement was partly performed, and therefore the Statute of Frauds requiring a written agreement is not applicable. The defendant also seeks dismissal of the plaintiffs' second, third, fifth, seventh and eighth causes of action, pursuant to CPLR 3212(b), as a matter of law.

Apparently, there have been disputes between the parties over the years concerning use of the common areas, including the basement, shed, front yard, backyard, backroom and a storage closet. In her affidavit, the defendant contends that she had sole use and occupancy of those common areas, and that she permitted the plaintiffs to access the common areas on the first and second floors. The split of the expenses for upkeep and maintenance of the premises as well as the mortgage was agreed upon, and each party complied with the arrangement for the first 10 years.

The relationship between the parties deteriorated over the years and culminated in the defendant changing the lock to the door separating the living areas of the parties in December of 2019. The plaintiffs claim that the defendant refused to provide the plaintiffs with a key to the door, and were excluded from the use and enjoyment of the common areas of the property. The defendant asserts that the plaintiffs have stopped paying the agreed upon expenses and mortgage.

The property was placed on the market for sale, and in December of 2019 an offer of \$1.5 million dollars was rejected by the parties. Thereafter, the defendant refused to allow a showing of her part of the house until the plaintiffs brought all payments up-to-date. The parties ceased all attempts to sell the property in January of 2020, and this action followed.

It is well-settled that one who holds an interest in real property as a tenant in common may maintain an action for the partition of the property and for a sale, if it appears that a partition alone would greatly prejudice the owners of the premises. *See* Real Property Actions and Proceedings Law (hereinafter RPAPL) § 901(1); *see also Tsoukas v Tsoukas*, 107 AD3d 879 (2d Dept 2013); *Donlon v Diamico*, 33 AD3d 841 (2d Dept 2006). However, before a partition or sale may be directed, a determination must be made as to the rights, shares or interests of the parties and where a sale is demanded, whether the property or any part thereof is so circumstanced that a partition cannot be made without great prejudice to the owners. *See* RPAPL § 915. Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises. *See* RPAPL § 911; §915; *Hales v Ross*, 89 AD3d 1261 (2d Dept 2011); *see also Lauriello v Gallotta*, 70 AD3d 1009 (2d Dept 2010).

Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report. *See* RPAPL § 911; § 907; *see also Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869 (2d Dept 1985). Moreover, because of the equitable nature of a partition action, an accounting by and between the parties is necessary, and should be done as a matter of right before entry of an interlocutory or final judgment, and before any division of funds between the parties is adjudicated. *See Donlon v Diamico*, 33 AD3d 841. The Court has the authority to adjudicate the rights of the parties “so each receives his or her proper share of the property and its benefits.” *See Brady v Varrone*, 65 AD3d 600, 602 (2d Dept 2009).

Here, the plaintiffs have demonstrated their entitlement to maintain this action for partition by providing a certified copy of the deed indicating that the plaintiffs hold an undivided one-third interest in the property, and that the defendant holds an undivided two-thirds interest in the property as tenants in common, which is not disputed by the defendant. The defendant has

failed to raise a triable issue of fact that a physical partition of the property can be accomplished without great prejudice to the owners. The unsworn and uncertified construction invoice submitted by the defendant which ostensibly provides an estimate of the cost of physically partitioning the premises to permit the plaintiffs access to the common areas, is insufficient to support a showing that partitioning is possible or even plausible. In light of the foregoing, the plaintiffs' motion seeking partition and sale of the property is granted.

The plaintiffs have also established their entitlement to dismissal of the defendant's first counterclaim seeking a declaratory judgment permitting her exclusive use and enjoyment of the first and second floor of the premises, including the backyard, basement, first floor backroom and storage area; that the plaintiffs have no legal entitlement to partition and sale of the property; and that the plaintiffs are not entitled to an accounting from the defendant. A tenancy in common represents a form of ownership which provides for the "right of each cotenant to use and enjoy the entire property as would a sole owner. This undivided interest is a right enjoyed by all the cotenants whether or not they are in actual possession of the premises." See *Butler v Rafferty*, 100 NY2d 265, 269 (2003). Therefore, the plaintiffs and the defendant each have the right to use and enjoy all parts of the premises, and contrary to the defendant's assertions, she is not entitled to exclusive use and occupancy of specific sections of the property. Moreover, the defendant has failed to demonstrate that there was a binding agreement between the parties concerning her right to exclusive use and occupancy of those particular areas of the premises. The alleged oral agreement falls within the purview of the Statute of Frauds, which holds that "[a]n oral agreement to convey an estate or interest in real property...is nugatory and unenforceable," and "[a] party to the agreement may legally and rightfully refuse to recognize or perform it." See *Pattelli v Bell*, 187 Misc.2d 275, 278, 2001 NY Slip Op 21098 (Sup Ct, Richmond County 2001), quoting *Woolley v Stewart*, 222 NY 347, 350-351 (1918) (internal quotation marks omitted).

As to the defendant's cross-motion, she has not tendered admissible evidence establishing her entitlement to summary judgment on her second and third counterclaims which seek damages based on the plaintiffs' alleged failure to pay for the expenses, utilities, mortgage, insurance and taxes on the property. As such, that prong of the defendant's cross motion is denied. However, the defendant's motion seeking an accounting is granted, as it is a necessary requisite to a partition of sale. See *Donlon v Diamico*, 33 AD3d 841.

Finally, the defendant's request for dismissal of the plaintiffs' second, third, fifth, seventh and eighth causes of action based on CPLR § 3212(b) is denied. Section 3212(b) provides, in pertinent part, that "[e]xcept as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." The plaintiffs'

second, third, fifth, seventh and eighth causes of action involve allegations that the defendant prevented the plaintiffs from use and occupancy of the entire premises; that the defendant ejected the plaintiffs in a “forcible and unlawful manner”; that the defendant destroyed and demolished areas of the premises; that the defendant has improperly exercised exclusive use and occupancy of the common areas of the premises; and that the defendant deliberately inflicted harm upon the plaintiffs. In the case at bar, the defendant has failed to submit admissible evidence, other than her own conclusory affidavit, demonstrating her entitlement to summary judgment as a matter of law that no genuine issue of fact exists concerning these causes of action. *See Zuckerman v City of New York*, 49 NY2d 557 (1980).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the plaintiffs’ motion for summary judgment (Motion 02) on their first cause of action seeking partition and sale of the property is granted; and it is further

ORDERED AND ADJUDGED, that the plaintiffs have demonstrated that the property cannot be physically partitioned without great prejudice to the owners; and it is further

ORDERED AND ADJUDGED, that the plaintiffs own an undivided one-third interest in the subject premises and the defendant owns an undivided two-thirds 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 determine 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 prong of the plaintiffs’ motion seeking dismissal of the defendant’s first counterclaim is granted; and it is further

ORDERED AND ADJUDGED, that the defendant's cross motion (Motion 03) seeking summary judgment on her second and third counterclaims is denied; and it is further

ORDERED AND ADJUDGED, that the prong of the defendant's motion seeking summary judgment on her fourth counterclaim and seeking an accounting of each parties' share of the costs and expenses, mortgages, liens, encumbrances or any other expenses associated with the maintenance and upkeep of the property is granted to the extent that an accounting shall be conducted by the Special Referee hereby appointed; and it is further

ORDERED AND ADJUDGED, that the prong of the defendant's motion seeking dismissal of the plaintiffs' second, third, fifth, seventh and eighth causes of action is denied.

This constitutes the decision and order of the Court.

Dated: April 15, 2021



HON. LILLIAN WAN, J.S.C.

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